(22,306.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 385.

THE CITY OF CINCINNATI, PLAINTIFF IN ERROR,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1911.

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1 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court, in the City of Columbus, Ohio, this 17th day of August, A. D. 1910.

[Seal the Supreme Court of the State of Ohio.]

JOHN S. McNUTT,
Clerk of Supreme Court of State of Ohio,
By E. W. HORN, *Deputy.*

2 Supreme Court of Ohio.

No. 12392.

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Petition for a Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

To the Honorable Augustus N. Summers, Chief Justice of the Supreme Court of the State of Ohio:

Now comes the City of Cincinnati, plaintiff in error in the above entitled cause, by Edward M. Ballard, Solicitor of said City of Cincinnati, and complains and alleges that it is a citizen of the United States of America.

That heretofore, to-wit, on the 24th day of January, 1910, a petition was filed by this petitioner against the defendant in error, The Louisville & Nashville Railroad Company, in the Common Pleas Court of Hamilton County, Ohio, and that on the same day said defendant in error demurred to said petition.

That subsequently, to-wit, on the 7th day of February, 1910, this petitioner filed in said court an amended petition wherein it was among other things alleged that said defendant in error, had filed an action in the Insolvency Court of Hamilton County, Ohio, for the purpose of appropriating an easement over the common or public landing in the City of Cincinnati in accordance with certain plans.

3 That the council of said City of Cincinnati on the 28th day of June, 1909, had passed an ordinance by which it approved said plans, and undertook to agree with said defendant

in error upon the manner, terms and conditions upon which the said defendant in error might use and occupy the said common or public landing.

That said council had no authority to pass the ordinance aforesaid for the reason that section 3283*a* of the Revised Statutes of Ohio, passed by the General Assembly of the State of Ohio on the 9th day of May, 1908, under which the aforesaid ordinance was passed, and said proceedings in the Insolvency Court were instituted, when applied to the common or public landing in the City of Cincinnati was in conflict with the provisions of Section 10 of Article 1 of the Federal Constitution, in that it impaired the obligations of the contract of January, 1789, dedicating said common or public landing to the inhabitants of the Town of Cincinnati forever.

That said amended petition among other things prayed for a temporary injunction restraining the said The Louisville and Nashville Railroad Company, from prosecuting or maintaining said action in said Insolvency Court to appropriate an easement across the said common or public landing, and that on final hearing said injunction be made perpetual.

That on said 7th day of February, 1910, said defendant in error, The Louisville and Nashville Railroad Company filed a general demurrer to said amended petition, on the ground that it did not state facts sufficient to constitute a cause of action.

That a hearing was had in said court upon said amended petition and the demurrer thereto, and said court on the 3rd day of March,
4 1910, entered a judgment whereby it sustained said demurrer to the amended petition and dismissed said amended petition at the cost of this petitioner, and thereby decided adversely to the claims of this petitioner and held that said section 3283*a* of the Revised Statutes of Ohio providing that,

"If it be necessary, in the judgment of the board of directors of any domestic or foreign corporation owning or operating a railroad wholly or partly within the state of Ohio, to use and occupy for an elevated track any portion of any public ground lying within the limits of any municipality and dedicated to the public for use as a public ground, common, landing or wharf, or for any other public purpose, excepting all streets, avenues, alley, or public road, such company may appropriate an easement over so much of such ground as may be necessary for such purpose, including the right to maintain the necessary piers and supports for said elevated track; but such appropriation shall be limited to such an easement as is necessary for the construction, maintenance and uses of such elevated track, in accordance with the plans hereinafter provided for. Proceedings for such appropriation shall be conducted in the manner provided in title II, chapter 8, part 3, of the Revised Statutes, so far as the same may be applicable thereto, but before any appropriation may be made hereunder there must be submitted to the council of the municipality general plans of the proposed structure showing the manner, character and location of all supports, any part of which will be upon such public ground, common, landing or wharf, and showing

the vertical and longitudinal clearances between the supports; and no right to appropriate shall accrue to the railroad company until after said company and the council shall have agreed upon the manner, terms and conditions upon which the property may be used or occupied and the plans submitted shall have been approved by ordinance duly passed by two thirds vote of council, but that such appropriation shall not be restrictive of the control by the public officers or authorities over such public ground, common, landing or wharf, subject to the continued maintenance and use of such elevated track upon the terms and conditions agreed upon, and such ordinance shall be read on three separate days and the rules requiring such reading shall not be suspended."

was not in conflict with Section 10 of Article 1 of the Federal Constitution when applied to the said common or public landing in that the provision- of said act do not impair the obligations of the contract dedicating to public use forever said common or public landing to the inhabitants of the Town of Cincinnati in January, 1789.

5 That this petitioner filed a petition in error in the Circuit Court of Hamilton County, Ohio, to said judgment of the Common Pleas Court wherein it claimed that said Common Pleas Court erred in holding that section 3283*a* of the Revised Statutes of Ohio when applied to the said common or public landing in Cincinnati, Ohio, was not in conflict with, or in violation of, the provsions of said Section 10 of Article 1 of the Federal Constitution, and in entering a judgment sustaining said demurrer and dismissing said amended petition.

That said Circuit Court on the 31st day of March, 1910, entered a judgment affirming in all respects the said judgment of the Common Pleas Court at the costs of this petitioner, thereby holding that said section 3283*a* of the Revised Statutes of Ohio, when applied to the said common or public landing in the City of Cincinnati was not in conflict with the provisions of said Section 10 of Article 1 of the Federal Constitution.

That this petitioner filed a petition in error in this court to said judgment of the Circuit Court, wherein it was claimed that said court erred in holding that said section 3283*a* of the Revised Statutes of Ohio, when applied to the said common or public landing in Cincinnati, was not in conflict with the provisions of said Section 10 of Article 1 of the Federal Constitution, and in affirming said judgment of the Common Pleas Court.

That this court on the 28th day of June, 1910, rendered a final judgment against this petitioner affirming in all respects said judgment of the Circuit Court of Hamilton County, Ohio, and

6 wherein it was adjudged that said section 3283*a* of the Revised Statutes of Ohio was not in conflict with the provisions of Section 10 of Article 1 of the Federal Constitution, when applied to the said common or public landing of the City of Cincinnati, in that the provisions of said section 3283*a* do not impair the obligations of the contract dedicating to public use forever said common or public landing to the inhabitants of the Town of Cincinnati, in

January 1789, all of which appears in the record and final judgment of this court, whereby manifest error has happened to the great damage of this petitioner.

That said judgment of this court was and is a final judgment in the highest court of the State of Ohio in which a decision in said suit could or can be had.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof to the end that the record in said cause may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected and said judgment reversed and your petitioner restored to all things it has lost by reason thereof; that the bond herewith presented be approved, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

THE CITY OF CINCINNATI, *Petitioner,*
By EDWARD M. BALLARD,
Solicitor of Cincinnati,
ALBERT BETTINGER,
Attorneys for Petitioner.

7 The writ of error as prayed for in the foregoing petition is hereby allowed this 2nd day of August, 1910, and the bond for that purpose is fixed at $500.00.

Dated at Columbus, Ohio, this 2nd day of August 1910.

AUGUSTUS N. SUMMERS,
Chief Justice, Supreme Court of the State of Ohio.

Filed in my office this — day of ——, 1910.

—— ——,
Clerk, Supreme Court of the State of Ohio.

8 [Endorsed:] #12392. Supreme Court of Ohio. The City of Cincinnati, Plaintiff in Error, vs. The Louisville & Nashville Railroad Company, a corporation, Defendant in Error. Petition for a Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio. Filed Aug. 3, 1910. Supreme Court of Ohio. John S. McNutt, Clerk. Edward M. Ballard, Solicitor of Cincinnati, Albert Bettinger, Attorneys for Petitioner.

9 Supreme Court of Ohio.

No. 12392.

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Assignment of Errors.

Now comes the City of Cincinnati, Plaintiff in Error, and respectfully submits that in the record, proceedings and final judgment of the Supreme Court of the State of Ohio, in the above entitled cause, there is manifest error in this, to wit:

First. That the Supreme Court of the State of Ohio erred in holding that section 3283*a* of the Revised Statutes of Ohio passed by the General Assembly of the State of Ohio on the 9th day of May 1908, is not repugnant to and in conflict with the provisions of Section 10 of Article 1 of the Federal Constitution, which declares that "no state shall * * * pass any * * * law impairing the obligation of contracts," when applied to the Public Landing in the City of Cincinnati.

Second. That the final judgment of the Supreme Court of the State of Ohio is repugnant to, and in conflict with said section 10 of Article 1 of the Federal Constitution.

Third. That said Supreme Court of the State of Ohio erred in holding that under the provisions of said section 3283*a* of the Revised Statutes of Ohio, the defendant in error, The Louisville
10 and Nashville Railroad Company, acquired the right to institute condemnation proceedings for the purpose of appropriating an easement across the Public Landing in the City of Cincinnati.

Fourth. That said Supreme Court of the State of Ohio erred in not holding that section 3283a is repugnant to, and in conflict with said section 10 of Article 1 of the Federal Constitution, when applied to the Public Landing in the City of Cincinnati.

Fifth. That said Supreme Court of the State of Ohio erred in affirming the judgment of the Circuit Court of Hamilton County, State of Ohio, which judgment of said Circuit Court affirmed the judgment of the Common Pleas Court of Hamilton County, State of Ohio, sustaining a demurrer to, and dismissing the amended petition.

Sixth. For other errors apparent on said record and proceedings.

Wherefore plaintiff in error, the City of Cincinnati, prays that the said judgment of said Supreme Court of Ohio, may be reversed, annulled and held for naught, and that it may be restored to all things it has lost by reason thereof.

EDWARD M. BALLARD,
Solicitor of Cincinnati,
ALBERT BETTINGER,
Attorneys for the City of Cincinnati, Plaintiff in Error.

11 [Endorsed:] No. 12392. Supreme Court of Ohio. The City of Cincinnati, Plaintiff in Error, vs. The Louisville & Nashville Railroad Company, a corporation, Defendant in Error. Assignment of Errors. Filed Aug. 3, 1910. Supreme Court of Ohio. John S. McNutt, Clerk. Edward M. Ballard, Solicitor of Cincinnati, Albert Bettinger, Attorneys for Plaintiff in Error.

12 Supreme Court of Ohio.

No. 12392.

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Order Allowing Writ of Error.

The above entitled cause came on to be heard on the petition of plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and upon examination of said petition and record in said cause and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said cause;

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States and that the bond presented by said petitioner be and the same is hereby approved.

AUGUSTUS N. SUMMERS,
Chief Justice of the Supreme Court of the State of Ohio.

13 [Endorsed:] No. 12392. Supreme Court of Ohio. The City of Cincinnati, Plaintiff in Error, vs. The Louisville & Nashville Railroad Company, Defendant in Error. Order Allowing Writ of Error. Filed Aug. 3, 1910. Supreme Court of Ohio. John S. McNutt, Clerk. Edward M. Ballard, Solicitor of Cincinnati, Albert Bettinger, Attorneys for Plaintiff in Error.

14 Supreme Court of Ohio.

No. 12392.

THE CITY OF CINCINNATI, Plaintiff in Error,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the City of Cincinnati and The Louisville & Nashville Railroad Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution or of a treaty or statute of, or commission held under the United States, and
15 the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said the City of Cincinnati as by its complaint appears, we being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washingon on the 26th day of August, 1910, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Associate Justice of the

said Supreme Court, the 2d day of August in the year of our Lord, 1910.

[Seal of the Circuit Court, Southern Dist. of Ohio.]

B. E. DILLEY,
Clerk U. S. Circuit Court, S. D. O.

Allowed by

AUGUSTUS N. SUMMERS,
Chief Justice of the Supreme Court of the State of Ohio.

16 [Endorsed:] No. 12392. Supreme Court of Ohio. The City of Cincinnati, Plaintiff in Error, vs. The Louisville & Nashville Railroad Company, Defendant in Error. Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed Aug. 3, 1910. Supreme Court of Ohio. John S. McNutt, Clerk. Edward M. Ballard, Solicitor of Cincinnati, Albert Bettinger, Attorneys for Plaintiff in Error.

17 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1910.

No. 12392.

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Bond.

Know all men by these presents, that we, the City of Cincinnati, as principal, and the Empire State Surety Company as surety, are held and firmly bound unto The Louisville and Nashville Railroad Company, in the sum of $500.00 to be paid to said obligees, their successors, representatives and assigns; to the payment of which, well and truly to be made we bind ourselves and our successors jointly and severally by these presents.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Ohio.

Now therefore the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, we have hereunto set our hands and seals this 22 day of July 1910.

THE CITY OF CINCINNATI,
By EDWARD M. BALLARD, *City Solicitor.*
THE EMPIRE STATE SURETY COMPANY,
By HARRY G. JOHANSING, *Attorney in Fact.*

In presence of:
WALTER SCHMITT,
By CHARLES N. STEPHENS, JR.,
Attorney in Fact.

I hereby approve the foregoing bond and sureties this 2nd day of August 1910.

AUGUSTUS N. SUMMERS,
Chief Justice of the Supreme Court of the State of Ohio.

I, John S. McNutt, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing Bond is truly taken and correctly copied from the Records of said Court, to-wit: from Original bond filed in this court in the above case on August 3rd, 1910.

In witness whereof I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 16th day of August A. D. 1910.

[Seal the Supreme Court of the State of Ohio.]

JOHN S. McNUTT, *Clerk,*
By E. W. HORN, *Deputy.*

18 [Endorsed:] Supreme Court of the State of Ohio. No. 12392. The City of Cincinnati vs. The L. & N. R. R. Co.

19 Supreme Court of Ohio.

No. 12392.

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Waiver of Citation.

Now comes The Louisville & Nashville Railroad Company defendant in error in the above entitled cause and hereby waives the issue and service of citation on the writ of error heretofore allowed in the above entitled cause.

ELLIS G. KINKEAD,
____ ____,
Attorneys for The Louisville and Nashville Railroad Company, Defendant in Error.

August 2nd 1910.

20 [Endorsed:] No. 12392. Supreme Court of Ohio. The City of Cincinnati, Plaintiff in Error, vs. The Louisville & Nashville Railroad Company, Defendant in Error. Waiver of Citation. Filed Aug. 3, 1910. Supreme Court of Ohio. John S. McNutt, Clerk. Edward M. Ballard, Solicitor of Cincinnati, Albert Bettinger, Attorneys for Plaintiff in Error.

21 Supreme Court of Ohio.

No. 12392.

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Precipe for Transcript of Record.

To the Clerk of the Supreme Court of Ohio:

Please furnish a transcript of the record, proceedings and papers in the above entitled cause duly authenticated, for transmission to the Supreme Court of the United States.

THE CITY OF CINCINNATI,
By EDWARD M. BALLARD,
Solicitor of Cincinnati,
ALBERT BETTINGER,
Attorneys for the City of Cincinnati,
Plaintiff in Error.

22 [Endorsed:] No. 12392. Supreme Court of Ohio. The City of Cincinnati, Plaintiff in Error, vs. The Louisville & Nashville Railroad Company, a corporation, Defendant in Error. Precipe for Transcript of Record. Filed Aug. 3, 1910. Supreme Court of Ohio. John S. McNutt, Clerk. Edward M. Ballard, Solicitor of Cincinnati, Albert Bettinger, Attorneys for Plaintiff in Error.

23 In the Supreme Court of Ohio.

No. 12392.

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Petition in Error.

[Filed April 4, 1910.]

Plaintiff in error says that at the January Term, A. D. 1910, of the Circuit Court of Hamilton county, the defendant in error re-

covered a judgment by the consideration of the said court against the plaintiff in error in an action then pending therein, wherein the plaintiff in error was plaintiff in error and defendant in error was defendant in error, a transcript of the docket and journal entries whereof, together with the original papers therein is filed herewith.

There was error in said record and proceedings in this, to wit:

24 1. Said court erred in affirming the judgment of the Common Pleas Court.

2. The said court erred in rendering judgment for the defendant in error when it should have rendered judgment for the plaintiff in error.

3. Other errors apparent upon the face of the record.

Plaintiff in error therefore prays that the said judgment be reversed and that it be restored to all things it has lost by reason thereof.

EDWARD M. BALLARD,
Solicitor of Cincinnati.

Waiver.

Summons in error is hereby waived and appearance of the defendant in error is hereby entered.

ELLIS G. KINKEAD.
J. B. FORAKER.

Motion.

[Filed April 9, 1910.]

Now comes the plaintiff in error and respectfully represents to the court that the blue print attached to the petition herein is not necessary for the presentation of the questions of law which will be presented to the court herein, and moves that the reproduction of the said blue print and attaching of the same to the printed record be dispensed with.

EDWARD M. BALLARD,
Solicitor of Cincinnati.

The defendant in error hereby consents to the granting of the above motion.

ELLIS G. KINKEAD,
J. B. FORAKER,
Attorneys for Defendant in Error.

Ordered by the court that this motion be and the same is hereby allowed by consent.

25 In the Circuit Court of Hamilton County, Ohio.

[No. 5054.]

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

Transcript of Docket and Journal Entries.

1910, March 8.—Petition in error, transcript and original papers filed.

1910, March 8.—Waiver of summons in error and entry of appearance of defendant in error filed. (See Pet.)

1910, March 31.—Min. 335.—Judgment of affirmance at plaintiff in error's costs.

This cause came on for hearing upon the petition in error, transcript and the original papers and pleadings of the Court of Common Pleas of Hamilton county, Ohio, and was argued by counsel; on consideration whereof the court finds there is no error in said proceedings and judgment.

It is therefore considered by the court that the judgment aforesaid be, and the same is hereby, affirmed and that the defendant
26 in error recover from the plaintiff in error its costs herein expended; to all of which the plaintiff in error excepts, and the court being of the opinion that there was reasonable ground for proceedings in error allows no penalty.

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton county for execution upon this judgment.

1910, March 31.—Mandate sent to the Common Pleas Court.

[Duly certified.]

Petition in Error.

[Filed March 8, 1910.]

The plaintiff in error says that at the January Term, A. D. 1910, of the Court of Common Pleas of Hamilton county, Ohio, the defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in an action then pending therein, wherein the plaintiff in error was plaintiff and the defendant in error was defendant. The transcript of the docket and journal entries whereof, together with the original papers, is filed herewith. There is error in the said record and proceedings in this, to wit:

1. The said court erred in sustaining the demurrer of the defendant below to the amended petition.

2. The said court erred in giving judgment for the defendant below when it should have been given for the plaintiff below.

3. Other errors apparent upon the face of the record.

Plaintiff in error therefore prays that said judgment may
27 be reversed and that it be restored to all things that it has lost by reason thereof.

EDWARD M. BALLARD,
Solicitor of Cincinnati, Ohio.

Waiver.

Summons in error is waived and the appearance of the defendant in error is hereby entered.

KINKEAD & ROGERS,
J. B. FORAKER,
Attorneys for Defendant in Error.

March 7, 1910.

28 In the Court of Common Pleas, Hamilton County, Ohio.

[No. 144775.]

THE CITY OF CINCINNATI, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant.

Transcript of Docket and Journal Entries.

To February 7, 1910.—Petition filed January 24, 1910. Action for injunction and other relief.

1910, January 24.—Summons issued.

1910, January 24.—Demurrer of defendant filed.

1910, February 3.—Min. 3583.—Leave given to file amended petition.

1910, February 3.—Amended petition filed.

1910, February 7.—Summons returned endorsed: Received January 24, 1910, Henry W. Hamann, sheriff. Cincinnati, January 25, 1910. Served the within named defendant, The Louisville & Nashville Railroad Company, a corporation, by delivering a true copy of this writ with all the endorsements thereon personally to Brent Arnold, managing agent thereof at 2:30 p. m., no other chief officer being found in my county. Sheriff's fees $1. Henry W. Hamann, sheriff of Hamilton county, Ohio; by Geo. Paul, deputy.

29 1910, February 7.—Stipulation filed.

1910, February 7.—Demurrer to amended petition filed.

1910, March 3.—Min. 3674.—Entry sustaining demurrer to the amended petition; cause dismissed at plaintiff's costs; plaintiff excepts.

This day this cause came on to be heard upon the demurrer of defendant to the amended petition, and having been argued and submitted to the court, the court upon consideration thereof sustains

said demurrer. And it appearing that the plaintiff does not desire to plead farther, the court proceeding to render judgment, orders, decrees and adjudges that this cause be dismissed, and that the defendant go hence without day and recover its costs herein expended, taxed at $—; to all of which plaintiff excepts.

[Duly certified.]

30 *Amended Petition.*

[Filed February 3, 1910.]

[No. 144375.]

THE CITY OF CINCINNATI, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant.

Now comes The City of Cincinnati, by Edward M. Ballard, its duly elected solicitor, and brings this action in the name of the city under the statutes of Ohio in such cases made and provided, and on behalf of the inhabitants of said city, and says that it is a municipal corporation and city under the laws of Ohio. The defendant is a corporation organized under the laws of the State of Kentucky, for the purpose of owning and operating a steam railroad and it owns and operates a railroad partly within the State of Ohio.

The defendant has by the action of its board of directors declared that in its judgment it is necessary to use and occupy for an elevated track a portion of the common or public landing of the city of Cincinnati, Hamilton county, Ohio, which common or public landing was dedicated to the public perpetually to be used as a common in January, 1789. The said defendant in the manner aforesaid also declared
it necessary to cross certain streets with said elevated track
31 and place supports therefor within the lines of the said streets.

The said defendant in the manner aforesaid further declared that it was in the judgment of the said company necessary for it to maintain piers and supports for the said elevated track and to appropriate an easement across the said public landing for the construction, maintenance and use of the said elevated track and piers and supports therefor.

The defendant has submitted to counsel of the city of Cincinnati, the plaintiff herein, general plans of the proposed structure showing the manner, character and location of all supports, any part of which will be upon said common or public landing, and showing the vertical and longitudinal clearances between the said supports. Thereupon council of the said city of Cincinnati undertook to agree with the defendant upon the manner, terms and conditions upon which the property which the defendant had declared to be necessary to be appropriated might be used or occupied and the said council passed an ordinance undertaking to approve the said plans, which ordinance was duly passed by a two-thirds vote of council and approved by the

mayor. By the said ordinance council undertook to agree upon the manner, terms and conditions upon which the said defendant might use and occupy certain streets of the city of Cincinnati for the purposes aforesaid, in which agreement was specified the number, character and location of all supports for said track, any part of which were within the said streets. Thereafter the said ordinance was duly accepted by the defendant. A copy of the said ordinance and plan has been filed herein attached to the original petition and
32 marked "Exhibits A and B." The said copies are hereby adopted and made a part hereof.

Within sixty days after the said acceptance there was filed with the mayor of the said city a petition protesting against the grants contained in the said ordinance, which said petition was signed by a number of electors of said city in excess of 10 per cent. of the number of votes cast for mayor at the last preceding election for mayor. Thereupon the mayor certified the fact of the filing of said petition to the proper election officials. No general election has occurred since such certificate was filed and the question whether such grants shall be made has therefore not been submitted to the electors of said city of Cincinnati. Notwithstanding the filing of the said petition and the certificate of the same to the proper election officials, the said defendant is about to and will, unless restrained, construct its road over the said streets and place supports within the lines of the said streets in accordance with the pretended grant of the aforesaid ordinance of council. The said supports, if constructed, will permanently interfere with the free use of the said streets and will work irreparable damage to this plaintiff, for which it has no adequate remedy at law.

Furthermore, the defendant has filed an action in the court of insolvency of Hamilton county, Ohio, for the purpose of appropriating an easement over the said common or public landing in accordance with the plans which council undertook to approve by the ordinance aforesaid. The said defendant threatens to and will, unless restrained, prosecute the said action to a conclusion and thereby appropriate the said easement. If this action is
33 prosecuted, the plaintiff will be compelled to make an unnecessary and unlawful expenditure of the public money in defending the same, which will work a damage to the said plaintiff for which it has no adequate remedy at law. The appropriation proceeding and the building of the piers in the streets aforesaid are inseparably a part of the same transaction. A copy of the petition in the said action has heretofore been filed herein, attached to the original petition and marked "Exhibit C." The said copy is hereby adopted and made a part hereof.

The said council had no authority to pass the ordinance aforesaid for the reason that the statutes under which the above described proceedings were had are in so far as they apply to the said common or public landing in violation of Section 10, Article I of the Constitution of the United States, inhibiting a state from passing a law impairing the obligation of contracts, also in violation of Article II of the Ordinance of 1787, and also in violation of the Constitution of

the State of Ohio. Furthermore, by reason of the filing of the protest above described, the said defendant has no authority to proceed to build the piers in the streets or to prosecute its action to appropriate until the question whether the purported grants in the said ordinance shall be made shall have been submitted to the electors of the said city at the next general election by the proper election officials, in accordanc with the statute in such case made and provided.

Wherefore, plainiff prays that a temporary restraining order may issue herein, restraining the defendant from erecting any piers
34 within the lines of any of the public streets of the city of Cincinnati, as provided for by the ordinance above described and the plans approved by the said ordinance; and, further, that it be restrained from prosecuting or maintaining its action to appropriate an easement across the said common or public landing, in accordance with the said ordinance and plans, and that upon final hearing the defendant shall be perpetually enjoined from doing any of the acts aforesaid, and for such other relief as may be proper.

EDWARD M. BALLARD,
Solicitor of Cincinnati.

[Duly verified.]

"EXHIBIT A."

An ordinance agreeing upon the manner, terms and conditions upon which The Louisville & Nashville Railroad Company may use, occupy and cross over, along and upon the streets and public grounds and public landing of the city of Cincinnati for the purpose of constructing, maintaining and operating a portion of its steam railroad from a point at or near Pier No. 1 on the Ohio side of the Newport and Cincinnati bridge in the city of Cincinnati, to the site of a proposed depot south of Water street, between Vine and Plum streets, in said city; and approving general plans for the crossing of the public landing by said railroad company with an overhead railroad viaduct, with the necessary supports and appurtenances.

Whereas, It is necessary in the location of a part of the railroad owned and operated by The Louisville & Nashville Railroad
35 Company, to occupy with elevated tracks with necessary supports therefor, certain public streets and grounds in the city of Cincinnati; and

Whereas, It is also necessary in the judgment of the board of directors of said company to use and occupy for an elevated railroad track a portion of the public landing of said city; and

Whereas, Said company has submitted to the council of the city of Cincinnati general plans of the proposed structure crossing said public landing, showing the number, manner, character and location of all supports upon said public landing, and showing the vertical and longitudinal clearances between said supports;

Now, therefore, be it ordained by the council of the city of Cincinnati, State of Ohio, two-thirds of the members elected thereto concurring:

SECTION 1. That the city of Cincinnati does hereby agree with The Louisville & Nashville Railroad Company that the said company may occupy, use and cross over, along and upon such streets and public grounds in said city, and so much thereof as is necessary to construct, maintain and operate a steam railroad of the character and along the route hereinafter described, from a point at or near Pier No. 1 on the Ohio side of the Newport and Cincinnati bridge in the city of Cincinnati to the site of a proposed depot south of Water street, between Vine and Plum streets, in said city, including switches and spur tracks, as hereinafter described. The route to be followed by said railroad racks along the center lines thereof shall be as follows:

36 Beginning at Pier No. 1 of the Newport and Cincinnati bridge; thence over private property with a twelve degree and thirty-five minute (12° 35′) curve to the left, said curve being a continuance of the curve on the bridge, one hundred and fifty-two (152) feet; thence over the same with a twelve degree and nineteen minute (12° 19′) curve to the left, two hundred and seventy-six (276) feet to the south side of Front street, thirty-one (31) feet west of the east side of Pike street extended; thence over the south sidewalk of Front street, with the same curve, seventy-five (75) feet; thence over the same with an eleven degree and twenty-two minute (11° 22′) curve to the left, eighty-four (84) feet; thence over private property with the same curve one hundred and twenty-one (121) feet; thence over the same with a straight line seventy-three (73) feet; thence over the same with a twelve degree (12°) curve to the right eighty-seven (87) feet to the east side of Lawrence street, ninety (90) feet south of the south side of Front street; thence across Lawrence street with the same curve fifty-four (54) feet; thence over private property with the same curve fifty-four (54) feet; thence over the same with a straight line ten (10) feet north of Giffin street and parallel thereto four hundred and forty-eight (448) feet to the east side of Ludlow street; thence across Ludlow street with the same straight line seventy (70) feet; thence over private property with the same straight line one hundred and sixty (160) feet; thence over the same with a ten degree and forty-six minute (10° 46′) curve to the right two hundred and sixty-nine
37 (269) feet; thence over the same with a straight line fifty (50) feet to the east line of the public landing twenty-one and one-half (21½) feet south of the south side of Front street; thence over the public landing with the same straight line forty-eight (48) feet; thence over the same with a twelve degree (12°) curve to the left one hundred and twenty-six (126) feet; thence over the same with a straight line eight (8) feet north of the United States harbor line and parallel thereto eight hundred and forty-six (846) feet; thence over the same with a twelve degree (12°) curve to the left, thirty-six (36) feet to the west side of Main street seven (7) feet north of the south side of Water street; thence over the

south sidewalk of Water street with the same curve twenty-one (21) feet; thence with the same curve sixty-eight (68) feet; thence with a straight line forty-two (42) feet; thence with a twelve degree (12°) curve to the right one hundred and six (106) feet; thence with a straight line eighty-five (85) feet; thence with a twelve degree (12°) curve to the right sixty (60) feet; thence with a straight line six and one-half (6½) feet north of the United States harbor line and parallel thereto forty-eight (48) feet to the east side of Walnut street; thence across Walnut street with the same straight line sixty-seven (67) feet; thence with the same straight line four hundred and three (403) feet to the east side of Vine street; thence across Vine street with the same straight line sixty-seven (67) feet to the freight yard of The Louisville & Nashville Railroad Company.

Also beginning at a point on the above described line one
38 hundred and ninety-three (193) feet east of the east side of Walnut street when measured along said line; thence with a nine degree and thirty minute (9° 30′) curve to the right eighty-five (85) feet; thence with a twelve (12°) degree curve to the right forty-eight (48) feet; thence with a twelve — (12°) curve to the left forty-eight (48) feet; thence with a straight line tangent to the last described curve, and twenty-one (21) feet from and parallel to United States harbor line ten (10) feet to the east line of Walnut street, extended; thence across Walnut street with the same straight line sixty-seven (67) feet to the west line of Walnut street if extended; thence with the same straight line two hundred and fifty (250) feet; thence with a reversed four (4°) degree curve first to the left and then to the right ninety-three (93) feet to a straight line parallel to the United States harbor line and nineteen and one-half (19½) feet northward therefrom; thence with the same straight line sixty (60) feet to the east line of Vine street, or said east line of Vine street if extended; thence with the same straight line sixty-seven (67) feet across Vine street to the freight yard of The Louisville & Nashville Railroad Company.

The said railroad shall consist of an elevated viaduct for a single track from the Newport and Cincinnati bridge to a point one hundred and ninety (190) feet east of the east line of Walnut street from which point to a point two hundred (200) feet west of the west line of Walnut street the viaduct shall be for two tracks. From the last mentioned point the railroad shall consist of two tracks upon
39 private property, one to be laid upon the surface of the ground, and the other to be carried on timber trestle structure to the east line of Vine street; thence across Vine street, both tracks to be carried upon steel structure, to the freight yard of The Louisville & Nashville Railroad Company.

The viaduct shall be constructed with two lines of steel girders for each track, supported at varying intervals by steel bents, consisting of two posts braced together transversely by horizontal and diagonal braces, and generally (except across the public landing) braced together similarly in pairs to form towers. These posts shall be supported on concrete piers or pedestals, which on all streets and other public property shall be below the level of the ground.

The steel girders for that part of the viaduct which will lie between the Newport and Cincinnati bridge and the east side of the public landing shall be spaced nine (9) feet apart, center to center.

The viaduct on Front street shall be carried by seven bents with vertical posts twenty-two (22) inches wide lengthwise of the viaduct and eighteen (18) inches wide transversely, and the posts of the central five bents shall be at least eight (8) feet apart in the clear, with the northern posts on the north edge of the sidewalk so placed as to clear the roadway entirely. The two end bents shall have their northern posts set eight (8) feet south in the clear from the curb, and the southern posts shall be on private property. The transverse bracing of all these bents shall be so constructed as to give a vertical clearance between the posts for pedestrians using the side-
40 walk of at least eight (8) feet, and the longitudinal bracing between the bents so as to give a vertical clearance for vehicles of at least fifteen (15) feet. The distance between the bents shall not be less than twenty-nine (29) feet, center to center, when measured along the center line of track.

Lawrence street shall be crossed by a clear span not less than twenty-two (22) feet above the roadway, with no supports within the street lines.

Ludlow street shall be crossed by a fifty-three (53) foot span for the roadway, an eleven (11) foot span for the east sidewalk and a thirteen (13) foot four (4) inch span for the west sidewalk. The bents supporting these spans shall be at right angles to the viaduct and the posts composing the bents shall be twenty (20) inches wide, measured lengthwise of the viaduct and sixteen and one-half (16½) inches wide transversely. The posts supporting each end of the fifty-three (53) foot span shall be spaced nine (9) feet apart, center to center, transversely, and the center of the bent at the east end of said span shall be six (6) feet three (3) inches east of the east curb line, measured along the center line of track. The bent supporting the west end of the fifty-three (53) foot span shall be five (5) feet nine (9) inches west of the west curb line, measured along the center line of track. The clearances for the roadway shall be not less than fifty (50) feet horizontally and fifteen (15) feet vertically, and for the sidewalks shall be not less than eight (8) feet horizontally and fifteen (15) feet vertically.

41 Upon the south side of Water street three (3) feet ten (10) inches west of Main street, measured along the center line of track, there shall be one bent with its north post set close to the curb, so as to give a clear space of at least eight (8) feet between it and the building line. The south post of this bent shall be upon private property. There shall be not less than eight (8) feet vertical clearance between the sidewalk and the floor beam connecting the tops of the posts forming this bent. The posts of this bent shall be eighteen (18) inches wide lengthwise of viaduct and fifteen (15) inches wide transversely.

From the last described bent westwardly the construction shall be as follows:

There shall be a thirty-two (32) foot span, the east end resting

upon the last described bent, said span being partly above the south sidewalk of Water street, and giving a vertical clearance of not less than eight (8) feet above said sidewalk; the west end of said span being supported by a bent, the posts of which are braced together transversely, the dimensions of said posts being eighteen (18) inches lengthwise of the viaduct and fifteen (15) inches transversely; then shall follow a twenty-four foot six inch (24′ 6″) span, the east end of which shall be supported by the last described bent, and the west end by a braced tower having bents twenty-four (24) feet six (6) inches apart, center to centers of bents, when measured on the center line of the viaduct, the posts forming the bents to be braced together transversely and the two bents forming the tower to be braced
42 together longitudinally; this tower to carry a twenty-four (24) foot six (6) inch span. Following the last described twenty-four (24) foot six (6) inch span on braced tower shall be a twenty-five (25) foot span, supported at the east end on the tower last described, and at the west end by a bent consisting of two columns braced together transversely; then shall follow a twenty-five (25) foot span, the east end being supported on the last described and the west end by a similar braced tower having two bents twenty-four (24) feet six (6) inches apart center to center, braced together longitudinally, the posts of each bent being braced transversely, said last described tower supporting a twenty-four foot six inch (24′ 6″) span; then shall follow a twenty-four (24) foot six (6) inch span, the east end of which is supported by the braced tower last described, and the west end by a similar braced towed having two bents twenty-four (24) feet six (6) inches center to center, braced together longitudinally, the columns of each of said bents to be braced together transversely; said tower to carry a twenty-four (24) foot six (6) inch span; then shall follow a twenty-four (24) foot six (6) inch span, the east end of which is to be supported by the tower last described, the base of the columns of which shall be twelve (12) feet ten (10) inches apart center to center when measured transversely to the viaduct, and the west end by a bent composed of two columns braced together transversely, said columns being twelve (12) feet ten and three-eights (10⅜) inches apart at their bases when measured center to center transversely to the viaduct. The ver-
43 tical clearance of the above described spans south of the south property line of Water street shall not be less than sixteen (16) feet ten (10) inches, and the dimensions of the columns supporting them shall be fifteen (15) inches both lengthwise and transversely of the viaduct. Following the last twenty-four (24) foot six (6) inch span, above described, shall be a twenty-four (24) foot six (6) inch span with not less than sixteen (16) feet vertical clearance, the east end of said span being supported by a bent, the columns of which are twelve (12) feet ten and three-eights (10⅜) inches apart center to center of bases, as heretofore described, the west end resting on a bent with vertical columns eight (8) feet apart center to center, braced together transversely, said column being eighteen (18) inches wide lengthwise of the viaduct and fifteen (15) inches wide transversely; then shall follow a twenty-five (25) foot

span with not less than fifteen (15) feet vertical clearance, the east end supported by the bent last described and the west end supported by a braced tower composed of two bents twenty-five (25) feet center to center, each bent to have two vertical columns eighteen (18) inches wide lengthwise of the viaduct and fifteen (15) inches wide transversely spaced eleven (11) feet center to center, braced together transversely, the two bents of this tower being braced together longitudinally, said tower to support a twenty-five (25) foot span carrying two tracks; then shall follow a twenty-five (25) foot span, the east end of which to be supported on the tower last described, and the west end to be supported on a bent with vertical columns
44 eighteen (18) inches wide, lengthwise of the viaduct and fifteen (15) inches wide transversely, spaced fifteen (15) feet one (1) inch apart center to center, this span to have not less than fourteen (14) feet vertical clearance, and to carry two tracks; then shall follow two twenty-five (25) foot spans, side by side, having a vertical clearance of not less than fourteen (14) feet, each one to carry a separate track, the east end to be supported by the bent last described, and the west end of each span to be supported by separate towers, each composed of bents twenty-five (25) feet apart center to center, braced together longitudinally, each of these towers to carry a twenty-five (25) foot span. The columns of these towers to be fifteen (15) inches wide, both lengthwise and transversely of the viaduct, and the distance between them to be nine (9) feet seven and nine-sixteenths (7 9/16) inches center to center at the east end of each tower and nine (9) feet seven and nine-sixteenths (7 9/16) inches center to center at the west end of the south tower and nine (9) feet six and nine-sixteenths (6 9/16) inches at the west end of the north tower. The distance from the center of the northerly column of the north tower to the center of the southerly column of the south tower shall be twenty-two (22) feet five and nine-sixteenths (5 9/16) inches at the east and twenty- (25) feet two and one-fourth (2¼) inches at the west end of the towers. Then shall follow a twenty-five (25) foot span for each track, with a vertical clearance of not less than thirteen (13) feet, the east ends of these spans to be supported by the towers last described, the west ends of the spans to be supported by braced towers with bents
45 twenty-five (25) feet apart center to center; then shall follow for each track a braced tower supporting a twenty-five (25) foot span, the bents of each tower to be set at right angles to the south track and braced together both longitudinally and transversely, the supporting columns at each end of each tower to be fifteen (15) inches wide, both lengthwise and transversely of the viaduct, spaced twelve (12) feet two and three-eights (2⅜) inches apart when measured center to center; the distance from the center of the northerly column of the north tower to the southerly column of the south tower to be twenty-six (26) feet and six and five-eights (6⅝) inches at the east end of the tower, and twenty-six (26) feet eight and three-eights (8⅜) inches at the west end of the tower; the western bents of said last described tower being located two (2) feet six (6) inches west of the east line of Walnut street, measured along

the center line of the south track from the street line to the center line of the bent.

Walnut street shall be crossed by a sixty (60) foot span for each track, giving vertical clearance for vehicles of not less than fourteen (14) feet. The supports at the east end shall consist of the two towers last described and at the west end of two towers, with bents set at right angles to the tracks, the most easterly of which shall be three (3) feet four (4) inches east of the west property line of the street, measured along the center line of the south track from the property line to the center line of the bent. The posts of said bent to be fifteen (15) inches wide, both lengthwise and transversely of the viaduct.

46 Vine street shall be crossed by a steel structure supporting two tracks, the structure for each track having a forty-six (46) foot span over the roadway space, and two approach spans of not less than twelve (12) feet each. The vertical clearance beneath the northerly, or lower of the two spans, shall not be less than fourteen (14) feet for the roadway, and eight (8) feet for the sidewalks. The lateral clearance, or width of wagonway, shall be forty-two (42) feet. The clear width of each sidewalk shall be not less than nine and one-half (9½) feet. The supports for these spans, which will lie between the property lines of Vine street, shall consist of double bents in the sidewalk space, set parallel to and close to the curb line. The posts of said bents to be sixteen (16) inches lengthwise of the viaduct and fifteen (16) inches transversely. In order to obtain a vertical clearance as given herein, the roadway of Vine street shall be depressed, and shall be carried between retaining walls, the faces of which shall be in the curb lines and the tops of which shall be at the grade of the sidewalks.

SECTION 2. That the City of Cincinnati does hereby agree with the said Louisville and Nashville Railroad Company, that said company may use and occupy a portion of the public landing of said city for an elevated track with necessary supports, in the manner and upon the terms and conditions herein set forth, and that the general plans for the use and occupation of said public landing herewith submitted by said company to this council be, and they are, hereby approved.

The following shall be the location of the center line of said elevated track across said public landing:

47 Beginning at a point in the east line of said public landing twenty-one and one-half (21½) feet south of the south side of Front street; thence westwardly over the public landing with a continuation of the same straight line of the viaduct immediately east of the Public Landing a distance of forty-eight (48) feet; thence westwardly over the Public Landing with a twelve (12) degree curve to the left one hundred and twenty-six (126) feet; thence over the same westwardly with a straight line eight (8) feet north of the United States Harbor line and parallel thereto a distance of eight hundred and forty-six (846) feet; thence over the same westwardly with a twelve (12) degree curve to the left thirty-six (36) feet to the west side of Main street seven (7) feet north of the south side

of Water street; thence over the south sidewalk of Water street with the same curve twenty-one (21) feet to private property.

Upon the Public Landing there shall be no longitudinal bracing, thus permitting unobstructed travel between all the bents; the minimum vertical clearance shall be twelve (12) feet. The first bent on the Public Landing shall be fourteen (14) feet west of the east line of the Public Landing (or the east line of Broadway extended southwardly); then shall follow one span with supporting bents twenty-five (25) feet center to center; then shall follow six spans, where the viaduct is on twelve (12) degree curve, with supporting bents twenty-four and one-half (24½) feet center to center; then shall follow twelve spans with supporting bents twenty-five (25) feet
48 center to center; then shall follow one span with supporting bents twenty-four (24) feet seven and one-half (7½) inches center to center; then shall follow a span fifty (50) feet nine (9) inches between centers of supporting bents, said fifty (50) foot nine (9) inch span lying within the lines of Sycamore street extended southwardly; the east end of said span being four and eight-tenths (4.8) feet west of the east line of Sycamore street extended southwardly; then shall follow one span with supporting bents twenty-four (24) feet seven and one-half (7½) inches center to center; then four spans with supporting bents twenty-five (25) feet center to center; then one span with supporting bents twenty-four (24) feet seven and one-half (7½) inches center to center; then one span with supporting bents fifty (50) feet nine (9) inches center to center; then one span with supporting bents twenty-four (24) feet seven and one-half (7½) inches center to center; then nine (9) spans with supporting bents twenty-five (25) feet center to center; then two spans on twelve (12) degree curve with supporting bents twenty-four (24) feet six (6) inches center to center. The west bent of the last above described span being three (3) feet ten (10) inches west of the west line of Main street, measured along the center line of track. The steel posts of the bents supporting the two fifty (50) foot nine (9) inch spans shall be spaced thirteen (13) feet center to center, when measured in a direction transversely to the line of the viaduct. The vertical steel posts supporting the remainder of the spans upon the Public Landing shall be spaced nine (9) feet center to center in a direction transverse to the line
49 of the viaduct. The vertical clearance for vehicles benea-h each of the two fifty (50) foot nine (9) inch spans shall be not less than fifteen (15) feet; vertical clearance beneath the remaining spans on the Public Landing shall be not less than twelve (12) feet. The horizontal clearance between the supporting bents of the fifty (50) foot nine (9) inch spans shall be forty-nine (49) feet two (2) inches; the horizontal clearance between supporting bents of the twenty-five (25) foot spans shall be twenty-three (23) feet eight (8) inches; the horizontal clearance between the twenty-four and one-half (24½) foot spans shall be twenty-two (22) feet eleven (11) inches between the southerly posts, and twenty-three (23) feet four (4) inches between northerly posts. The columns supporting the short spans shall be sixteen (16) inches wide, meas-

ured lengthwise of the viaduct, and fifteen (15) inches wide transversely. The columns supporting the long spans shall be nineteen (19) inches wide, measured lengthwise of the viaduct and fifteen (15) inches wide transversely. There shall be concrete wheel guards around the base of columns, which, for the columns supporting short spans shall be two (2) feet ten (10) inches wide at the paving line, measured lengthwise of the viaduct, one (1) foot eleven (11) inches wide at the paving line, measured transversely, and twelve (12) inches high. For the columns supporting long spans the wheel guards shall be two (2) feet ten (10) inches wide at the paving line, measured lengthwise of the viaduct, two (2) feet four (4) inches wide at the paving line, measured transversely, and twelve (12) inches high.

50 In times of high water, when reasonably necessary, the said Louisville and Nashville Railroad Company shall permit wharf boats and water craft to tie to that portion of said structure which crosses the Public Landing.

SECTION 3. That before crossing Walnut street with the said tracks the said Louisville and Nashville Railroad Company shall, at its own expense and under the direction and supervision of the chief engineer of the Board of Public Service of the City of Cincinnati, lower the surface of said Walnut street from a point one hundred and one (101) feet south of the south line of Water street southwardly a distance of seventy-seven (77) feet, so that the grade of said Walnut street along the center line thereof after the work is completed, shall be as follows:

Beginning one hundred and one (101) feet south of the south line of Water street the grade shall descend southwardly three (3) feet in a distance of twenty-two (22) feet; then from a point one hundred and twenty-three (123) feet south of Water street to a point one hundred and seventy-eight (178) feet south of Water street the grade shall descend one (1) foot.

SECTION 4. That before crossing Vine street with said tracks the said Louisville and Nashville Railroad Company shall, at its own expense and under the direction of the chief engineer of the Board of Public Service of the City of Cincinnati, lower the surface of Vine street from a point one hundred and five (105) feet south of the south line of Water street southwardly a distance of one hundred and forty-eight (148) feet, so that the grade of the roadway of said Vine street after the work is completed, shall be as follows:

51 From said point one hundred and five (105) feet south of Water street southwardly eighty-eight (88) feet the grade shall descend sixteen (16) feet; from the latter point, southwardly sixty (60) feet the grade shall descend six-tenths (0.6) of a foot. The grade of the west sidewalk of Vine street shall remain unchanged from the south line of Water street to a point one hundred and eighty-one (181) feet south thereof, from which point steps shall be constructed descending six (6) feet in nine (9) feet, thence the grade shall be level to an intersection with the present grade at a point about two hundred and twenty-one (221) feet south of

the south line of Water street. The grade of the east sidewalk of Vine street shall remain unchanged from the south line of Water street to a point one hundred and fifty-nine (159) feet south thereof, from which point steps shall be constructed descending eight (8) feet eight (8) inches in thirteen (13) feet, thence the grade shall be level to an intersection with the present grade at a point about two hundred and twenty-three (223) feet south of the south line of Water street.

SECTION 5. That after lowering the surface of said Water street and Vine street, as herein above provided, the said Louisville and Nashville Railroad Company shall, at its own expense and under the direction and supervision of the chief engineer of the Board of Public Service, restore the roadways and sidewalks of said Walnut street and Vine street, so lowered, to their present condition of paving and repair, and all work shall be done to the satisfaction of the chief engineer of the Board of Public Service; and the
52 acceptance of this ordinance by said railway company shall impose upon said company an obligation to hold the City of Cincinnati harmless from any and all damage to private property, if any, caused by the lowering of said Walnut street and Vine street.

SECTION 6. This ordinance shall take effect and be in force and capable of acceptance from and after the earliest period allowed by law. The said railroad company shall have ninety (90) days from the passage of this ordinance in which to accept the same. If the ordinance is not accepted within ninety (90) days from and after its passage it shall become null and void.

Passed June 28, 1909.

E. O. BATHGATE,
President Protem. of Council.

Attest:

EDWIN HENDERSON, *Clerk.*

Approved:

JOHN GALVIN, *Acting Mayor.*

July 2, 1909.

"EXHIBIT C."

STATE OF OHIO,
County of Hamilton:

Court of Insolvency.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF CINCINNATI, a Municipal Corporation; THE COVINGton and Cincinnati Bridge Company, a Corporation; William White, Jr., Jennie White, Thomas White, Jessie White, Mary C. White Grey, Ira Grey, Her Husband; Providence White, Jr., Kate White Cuhl, Minnie White Williams, Emma White, Robert A. McNeal, William McNeal, Clara McNeal Hill, Mattie E. Roberts, A. G. Sanborn, Mildred B. Brooks and Franklin W.
53 Brooks, Her Husband; Mary Patterson, Heirs of Edward White, Deceased; the Unknown Heirs of said Edward White, Deceased; the Unknown Heirs of Kate White, Deceased; the Unknown Heirs of Mary Culbertson, Deceased; the Unknown Heirs of Bettie Thomas, Deceased; the Unknown Heirs of Samuel Freeman, Deceased; the Unknown Heirs of Matthias Denman, Deceased; the Unknown Heirs of Israel Ludlow, Deceased; and All Other Unknown Persons Owning any Interest, Legal or Equitable, in the Common Public Landing of the City of Cincinnati, Defendants.

Petition.

To the Honorable A. M. Warner, Judge of the Court of Insolvency of Hamilton County, Ohio:

The defendant, the City of Cincinnati, is a municipal corporation and a city under the laws of the State of Ohio, and the defendant, the Covington and Cincinnati Bridge Company, is a corporation under the laws of the States of Kentucky and Ohio.

The plaintiff, The Louisville and Nashville Railroad Company, is a corporation organized under the laws of the State of Kentucky, for the purpose of constructing, maintaining, owning and operating a railroad in that state and elsewhere, including the State of Ohio, with the necessary appurtenances thereto; it owns and operates a railroad partly within the State of Ohio, and said company has by the action of its board of directors declared that in its judgment it is necessary to use and occupy for an elevated track a portion of the Common or Public Landing in the City of Cincinnati,
54 Hamilton county, Ohio, which Common or Public Landing has been dedicated to public use as a common. Said common is bounded on the north by Front street, on the east by the east line of Broadway extended, on the west by Main street and the west side of Main street extended, and on the south by the Ohio river. As declared by the said board of directors, it is in the judg-

ment of said company necessary for it to maintain piers and supports for said elevated track and to appropriate an easement across said Public Landing for the construction, maintenance and use of said elevated track and piers and supports therefor, all in accordance with plans hereto attached, marked "Exhibit 1," and made part hereof.

The plans hereto attached have been submitted to the council of the City of Cincinnati. Such plans are general plans of the proposed structure and are plans showing the nature and location of all supports, any part of which will be on said common or Public Landing hereinbefore described. Said plans show the vertical and longitudinal clearance between said supports; and the council of the City of Cincinnati has agreed with this plaintiff upon the manner, terms and conditions upon which the property herein sought to be appropriated may be used or occupied, and said plans have been approved by an ordinance of the City of Cincinnati, duly passed by a two-thirds vote of council and approved by the mayor. Said ordinance is an ordinance of the City of Cincinnati known as ordinance No. 1284, entitled an "Ordinance agreeing upon the manner, terms and conditions upon which The Louisville and Nashville Railroad Company may use and occupy and cross
55 over, along and upon the streets and public grounds and Public Landing of the City of Cincinnati, for the purpose of constructing, maintaining and operating a portion of its steam railroad from a point, at or near pier No. 1 on the Ohio side of the Newport and Cincinnati bridge, in the City of Cincinnati, to the site of a proposed depot south of Water street, between Vine and Plum streets in said city; and approving general plans for the crossing of the public landing by said railroad company with an overhead railroad viaduct with the necessary supports and appurtenances," a copy of said ordinance being hereto attached and made part hereof, marked "Exhibit 2," which said ordinance was duly accepted by the plaintiff.

The easement sought to be appropriated in this proceeding is a part of the right of way of plaintiff's proposed track connecting its bridge across the Ohio River with the depot site referred to in said ordinance. A part of the construction upon said right of way, but not upon any part of the easement herein sought to be appropriated has been already appropriated.

The plaintiff is about to construct its said road over the remainder of the right of way from said bridge to the proposed depot site, including all streets, the crossing of which is agreed upon by said ordinance, save and excepting that it does not intend to construct its road across the Common or Public Landing until the conclusion of this proceeding. Plaintiff seeks by this proceeding to appropriate an easement in accordance with the plans and ordinance hereto attached and made part hereof, across the said Common or
56 Public Landing of the City of Cincinnati, said easement being for the construction, maintenance and operation of an elevated track with supports in said Common or Public Landing, in

strict accordance with said plans and ordinance hereto attached and made part hereof.

It is necessary for the plaintiff to make said appropriation, and the board of directors of the plaintiff company has declared the necessity of such appropriation for its use for the purpose of constructing and perpetually maintaining the said elevated track in accordance with said plans and ordinance pursuant to law.

The City of Cincinnati has an easement in said Common or Public Landing, and the other defendants to this action have some interest by way of fee or lesser title therein. The defendants, the City of Cincinnati, the Covington and Cincinnati Bridge Company, William White, Jr., Jennie White, Thomas White, Jessie White, Clara McNeal Hill, and Mattie E. Roberts are residents of the State of Ohio. The defendants, Mary C. White Grey and Ira Grey, her husband, are residents of Monticello, Indiana; the defendant, Kate White Cuhl, resides in the State of Indiana; the defendant, Robert A. McNeal, resides at Greenfork, Indiana; the defendant, William McNeal, resides at Minton Kansas; the defendant, A. G. Sanborn, resides at Indianapolis, Indiana; the defendants, Mildred B. Brooks and Franklin W. Brooks, her husband, reside at Washington, D. C.; the defendant, Mary Patterson, resides in the State of Illinois. The residence of each and all of said unknown heirs is unknown
57 to this plaintiff. The plaintiff has made diligent efforts but is unable to ascertain who are the said unknown heirs of Edward White, deceased; Kate White, deceased; Bettie Thomas, deceased; Mary Culbertson, deceased; Samuel Freeman, deceased; Matthias Denman, deceased, and Israel Ludlow, deceased. The plaintiff has reason to believe that there are other persons than those named herein who have, and claim, an interest, legal or equitable, in said Common or Public Landing, the names and addresses of which are to this plaintiff unknown, and cannot with reasonable diligence and effort be ascertained. The said defendant, the Covington and Cincinnati Bridge Company, has some interest in said common by way of contingent reversion of ferry rights.

It is impossible for the plaintiff to agree with the defendant, the City of Cincinnati, upon the sum of money to be paid it by way of compensation for the easement herein sought to be appropriated, and the plaintiff is unable to agree with the other defendant to this action, or with any of them, upon the sum of money to be paid them by way of compensation for their several interests in the easement herein sought to be appropriated.

Wherefore plaintiff prays that a jury be impaneled according to law for an inquiry and assessment of the compensation for the easement sought to be appropriated herein, and that upon payment into court, or to the proper owners, defendants herein, of an amount equal to the compensation so assessed, the appropriation of such property may be allowed and possession awarded it according
58 to law; that the court may divide the sum so paid or order its distribution among the several claimants in respect to their interests in said property.

____ ____,

Attorneys for Plaintiff.

STATE OF OHIO,
County of Hamilton, ss:

Brent Arnold, being first duly sworn, says he is general freight agent and superintendent of terminals of The Louisville and Nashville Railroad Company, plaintiff in the above proceeding, and that the facts stated in the foregoing petition are true as he verily believes.

—— ——.

Sworn to before me and subscribed in my presence this — day of January, 1910.

—— ——,
Notary Public, Hamilton County, Ohio.

Demurrer.

[Filed February 7, 1910.]

Now comes the defendant and demurs to the amended petition of the plaintiff herein, because said amended petition does not state facts sufficient to constitute a cause of action against said defendant.

KINKEAD, ROGERS & ELLIS AND
J. B. FORAKER,
Attorneys for Defendant.

59 I, John S. McNutt, clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing copy of the printed Record is a true and correct copy of the printed record filed in this Court in this case May 12th, 1910.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 16th day of August, A. D. 1910.

[Seal the Supreme Court of the State of Ohio.]

JOHN S. McNUTT, *Clerk,*
By E. W. HORN, *Deputy.*

60 [Endorsed:] No. 12392. Supreme Court of Ohio. The City of Cincinnati, Plaintiff in Error, vs. The Louisville & Nashville Railroad Company, a Corporation, Defendant in Error. Error to Circuit Court of Hamilton County, Ohio. Record. Filed May 12, 1910, Supreme Court of Ohio, John S. McNutt, Clerk. Edward M. Ballard, Solicitor of Cincinnati; Ellis G. Kinkead, J. B. Foraker, Attorneys for Defendant in Error.

61 In the Supreme Court of Ohio, January Term, A. D. 1910.

THE STATE OF OHIO,
City of Columbus, ss:

Certified Transcript of Docket and Journal Entries.

In the Record and Proceedings then and there had and held, among other things, is the following, to-wit:

Attorneys.	Title of Case.	Action.
Edward M. Ballard, City Solicitor, Cincinnati.	The City of Cincinnati	
	vs.	Error to the Circuit Court of Hamilton County.
Ellis G. Kinkead, J. B. Foraker, Cincinnati.	The Louisville & Nashville Railroad Company, a Corporation.	

Date.	Memoranda of pleadings, writs issued, etc. O. A.	Judgments, orders, and decrees.
1910.		
Apr. 4.	Petition in Error, waiver of summons, circuit court transcript and original papers filed.	
	Papers taken by F. B. Toothaker. 5/12/10 returned.	
Apr. 9.	Motion by plaintiff to dispense with reproducing blue print in printed record and consent filed.	
Apr. 19.		Motion by plaintiff to dispense with the reproduction of blue print in the printed record allowed by consent. J. 23-594. "Ordered by the Court that this motion be and the same is hereby allowed by consent."
May 12.	Printed record filed. 5/14/10. Proof of service filed.	
June 8.	Plaintiff's printed brief filed. 6/8/10 proof of service filed.	
	Motion by plaintiff to advance and notice filed.	
9.	Defendant's printed briefs and proof of service filed.	
14.		Motion by plaintiff to advance cause. J. 24-79.

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Date.	Memoranda of pleadings, etc., filed; writs issued, etc.	Judgments, orders, and decrees.
1910.		
		"Ordered by the Court that this motion be and the same is hereby allowed, and that oral argument be noted."
June 20.	Plaintiff's printed reply briefs filed and proof of service filed.	
28.		Judgment affirmed. J. 24-113. "This cause came on to be heard upon the transcript of the record of the Circuit Court of Hamilton County and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of said Circuit Court be and the same is hereby affirmed and it appearing to the Court that there were reasonable grounds for this proceeding in error it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended taxed at $——. Ordered, That a special mandate be sent to the Circuit Court of Hamilton County to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Circuit Court of Hamilton County "for entry."
28.	Mandate Issued. Original papers sent clerk.	
Aug. 3.	Petition for a writ of error from the Supreme Court of the United States to the Supreme Court of Ohio filed. Order allowing writ of error filed. Writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio filed. Assignment of error filed. Waiver of citation filed. Bond filed. Precipe for transcript of record filed.	

I, John S. McNutt, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing transcript is truly taken and correctly copied from the Records of said Court, to-wit: from Minute Book No. 29 and Journal Nos. 23-4.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 17th day of August, A. D. 1910.

[Seal The Supreme Court of the State of Ohio.]

JOHN S. McNUTT, *Clerk,*
By E. W. HORN, *Deputy.*

63 Supreme Court of State of Ohio.

THE CITY OF CINCINNATI, Plaintiff in Error,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant in Error.

STATE OF OHIO,
City of Columbus, ss:

I, John S. McNutt, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing Petition for Writ of Error, Assignment of Errors, Order allowing writ of error, Writ of Error, Waiver of Citation and præcipe for transcript of record are the original papers filed in this Court in the above entitled cause: that the copy of the Bond hereto attached is a true and correct copy of the original Bond filed in said cause; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said Supreme Court and used in the consideration of said cause; that the foregoing transcript of Docket and Journal Entries is truly taken and correctly copied from the records of said Court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of Ohio, this 17th day of August, A. D. 1910.

[Seal The Supreme Court of the State of Ohio.]

JOHN S. McNUTT,
Clerk of the Supreme Court of Ohio,
By E. W. HORN, *Deputy.*

Endorsed on cover: File No. 22,306. Ohio Supreme Court. Term No. 385. The City of Cincinnati, plaintiff in error, vs. The Louisville & Nashville Railroad Company. Filed August 27th, 1910. File No. 22,306.

21

Office Supreme Court, U. S.
FILED.
Sep. 30
OCT 9 1911
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 385.

CITY OF CINCINNATI,
Plaintiff in Error,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Defendant in Error.

Motion and Grounds of Defendant in Error to Advance for Hearing.

J. B. FORAKER,
ELLIS G. KINKEAD,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 685.

CITY OF CINCINNATI,

Plaintiff in Error,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Defendant in Error.

ON ERROR FROM THE SUPREME COURT OF THE STATE OF OHIO.

NOTICE.

To Honorable Edward M. Ballard, City Solicitor, City of Cincinnati, and Mr. Albert Bettinger, attorneys for the City of Cincinnati, plaintiff in error:

Please take notice that we shall make a motion for the defendant in error in the above entitled cause before the court at the opening of its session on Monday, October 16, 1911, or as soon thereafter as counsel can be heard, to advance the above styled cause for hearing at said October term at such time as the court may direct, and in support of said motion will file and present to the court at the

hearing of said motion the grounds therefor, a copy of which motion and grounds is herewith served upon you, dated September 27, 1911.

J. B. FORAKER,
ELLIS G. KINKEAD,
Attorneys for Defendant in Error.

Service of above notice is accepted and the motion to advance assented to, this September 27, 1911.

EDWARD M. BALLARD,
City Solicitor,
ALBERT BETTINGER,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 685.

CITY OF CINCINNATI,

Plaintiff in Error,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Defendant in Error.

MOTION AND GROUNDS OF DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

And now comes the defendant in error and moves the court to advance this cause for hearing at the present term, for the following reasons:

1. The cause originated in the Court of Common Pleas, Hamilton County, Ohio, by the filing of a petition by the City of Cincinnati seeking to enjoin the Louisville & Nashville Railroad Company from prosecuting or maintaining a proceeding which it had brought in the Court of Insolvency, Hamilton County, Ohio, to appropriate for railroad purposes an easement across a common or public landing in the City of Cincinnati, and from crossing with a railroad structure certain streets

in said City of Cincinnati. Said condemnation was authorized by an act of the General Assembly of the State of Ohio, known as Section 3283*a* of the Revised Statutes of Ohio, passed May 9, 1908.

In her petition in the said Court of Common Pleas the said City of Cincinnati alleged that the said common or public landing had been dedicated in January, 1789, to the inhabitants of the town of Cincinnati forever, and that at that time what is now the state of Ohio was a part of the Northwest Territory, established and governed by the Ordinance passed by the Confederate Congress June 13, 1787. It was claimed by the said City of Cincinnati that under said Ordinance of 1787 no authority existed to appropriate property within the Territory for ordinary railroad purposes, but that appropriation could be made only where the "public exigencies made it necessary for the common preservation"; that the said dedication in 1789 of said common conferred upon the inhabitants of Cincinnati contract rights which could not be appropriated for public purposes except where the "public exigencies made it necessary for the common preservation," and that the said act of the General Assembly of the State of Ohio, passed May 9, 1908, authorizing the condemnation for railroad purposes of an easement in commons or public landings dedicated to public use, by virtue of which act the said condemnation proceeding in said Court of Insolvency was being prosecuted, was, so far as it was being made applicable to said common or public landing in said City of Cincinnati, in violation of the provision of Article I, Section 10, of the Constitution of the United States, forbidding a state to make any law impairing the obligation of contracts.

To the petition of the City of Cincinnati the Louisville & Nashville Railroad Company filed a demurrer, which was sustained by the said Court of Common Pleas and judgment was entered by that court dismissing the City's petition. That judgment was affirmed by the Circuit Court of Hamilton County, Ohio, and later by the Supreme Court of Ohio.

The error proceedings in this court have been brought by the City of Cincinnati to reverse the said judgment of the Supreme Court of Ohio.

2. If, contrary to the contention of said Louisville & Nashville Railroad Company, under the said Ordinance of 1787 there was no power to appropriate property for public purposes except where public exigencies made it necessary for the common preservation, and that ordinance is still the fundamental law governing Ohio, and was not supplanted by the Constitution of the State of Ohio, subsequently adopted, then it follows that not only the common which is the subject matter of the proceeding at bar, but all other real estate in Ohio dedicated to special public uses prior to the creation of the State of Ohio and while it was a part of the Northwest Territory, is immune from appropriation for railroad purposes and all other ordinary public uses, and can only be taken for public purposes when necessary for the common preservation. And by the same reasoning all similar property in each of the other states which together once formed the Northwest Territory, is also in a class by itself outside the exercise by the state of the power of eminent domain except where the property to be taken is necessary for the common preservation. The extent to which such a conclusion would interfere with and prohibit needed public improvements in Ohio, Indiana,

Illinois, Michigan and Wisconsin, by municipalities, railroad companies, and other public and quasi-public corporations, is incalculable.

3. The easement sought to be acquired by the Louisville & Nashville Railroad Company in said common is for an overhead railroad viaduct connecting its bridge which spans the Ohio River east of the common, and a large tract of land lying west of the common which was purchased by the Railroad Company as a site for a freight yard and depot and for erecting thereon coal elevators. The only reasonably practicable way for connecting the said bridge on the east of said common and the freight yard on the west of the common, is by an overhead railroad viaduct which will cross over said common, for if the viaduct were constructed so as to pass around and north of the common the cost would be prohibitive and the grades undesirable for railroad operation. For years the Louisville & Nashville Railroad Company has been suffering from inadequate terminal facilities in Cincinnati for freight purposes, and it was with a view to remedying that condition and supplying, especially to the central part of Cincinnati, adequate facilities for the shipping and receiving of freight that the present project was entered upon. In furtherance of that purpose the Railroad Company purchased said bridge spanning the Ohio River, acquired extensive tracts of land for rights of way and for freight yards, and has partially constructed the viaduct. The total expenditures already made run into the millions. The delay in the final determination of the question of the right of the Railroad Company to acquire by appropriation proceedings a way across the said common involves not only the loss to the Railroad Company of a present

return on the said investment, a great part of which will be unproductive until the said viaduct has been constructed and is in operation, but also the great inconvenience and loss to the shipping public and the railroad company due to their being deprived of the benefits which would result from the operation of said proposed freight yards and depot and said coal terminals.

J. B. FORAKER,
ELLIS G. KINKEAD,
Attorneys for Defendant in Error.

Supreme Court of the United States.

THE CITY OF CINCINNATI,
Plaintiff in Error,

No. 385. *vs.*

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Defendant in Error.

Brief for the City of Cincinnati.

STATEMENT OF THE CASE.

This case comes into this court on a writ of error to the Supreme Court of Ohio, and involves the constitutionality of an act of the General Assembly of Ohio, under which the Louisville & Nashville Railroad Company, hereinafter called the railroad, seeks to condemn a right of way across the Public Landing at Cincinnati, said landing having been dedicated to public use forever in January, 1789, when the Ordinance of 1787, which permitted the exercise of the right of eminent domain only where

"the public exigencies make it necessary for the common preservation," was in force.

The facts of the case are as follows:

In January, 1789, Mathias Denman, Israel Ludlow and Robert Patterson laid out the town of Cincinnati. A plan was made and approved by the owners according to which the ground now known as the Public Landing, which is a strip of ground about 1000 feet front on the Ohio river, was set apart as a common for the use and benefit of the town forever, reserving only the right of a ferry. This dedication, as was decided by this court in 1832, vested a valid and indefeasible title in the City of Cincinnati, to hold in trust for the inhabitants forever.

City of Cincinnati v. Lessee of White, 6 Peters, 431.

The act of the General Assembly of Ohio, the constitutionality of which is before this court for determination, was passed on May 9, 1908, and was known as Section 3283*a* of the Revised Statutes of Ohio and read as follows (Record, pp. 2-3):

> "Section 3283*a*. If it be necessary, in the judgment of the board of directors of any domestic or foreign corporation owning or operating a railroad wholly or partly within the State of Ohio, to use and occupy for an elevated track any portion of any public ground lying within the limits of any municipality and dedicated to the public for use as a public ground, common, landing or wharf, or for any other public purpose, excepting all streets, avenues, alley, or public road, such company may appropriate an easement over so much of such ground as may be necessary for such purpose, including the right to maintain the necessary piers and supports for said elevated track; but such ap-

propriation shall be limited to such an easement as is necessary for the construction, maintenance and uses of such elevated track, in accordance with the plans hereinafter provided for. Proceedings for such appropriation shall be conducted in the manner provided in Title II, Chapter 8, Part 3, of the Revised Statutes, so far as the same may be applicable thereto, but before any appropriation may be made hereunder there must be submitted to the council of the municipality general plans of the proposed structure showing the manner, character and location of all supports, any part of which will be upon such public ground, common, landing or wharf, and showing the vertical and longitudinal clearances between the supports; and no right to appropriate shall accrue to the railroad company until after said company and the council shall have agreed upon the manner, terms and conditions upon which the property may be used or occupied and the plans submitted shall have been approved by ordinance duly passed by a two-thirds vote of council, but that such appropriation shall not be restrictive of the control by the public officers or authorities over such public ground, common, landing or wharf, subject to the continued maintenance and use of such elevated track upon the terms and conditions agreed upon, and such ordinance shall be read on three separate days and the rules requiring such reading shall not be suspended."

Since the recent revision of the statutes of Ohio, this section in substance is comprised in Sections 8767, 8768 and 8769 of the General Code. Because the old sectional number is used throughout the record we shall also employ it in this brief.

Acting under the authority of this act, the Council of the City of Cincinnati on June 28, 1909, passed an ordi-

nance, approving general plans for the erection of an elevated railroad across the Public Landing in Cincinnati, Ohio, and by which it undertook to agree with the railroad upon the manner, terms and conditions upon which the Public Landing might be used and occupied with such elevated railroad. (See Ordinance, Record, pp. 16-25.) Thereupon the railroad instituted a suit in the Insolvency Court of Hamilton County, Ohio, to appropriate an easement for the construction of said elevated railroad across the Public Landing, in accordance with the plans approved by the ordinance (See Petition, Rec., pp. 26-29). The City of Cincinnati then filed a suit in the Common Pleas Court of Hamilton County, Ohio, and later filed an amended petition to perpetually restrain the railroad from erecting said elevated railroad on the Public Landing, and from prosecuting or maintaining its action in the Insolvency Court upon two grounds: *first*, that the grant to the railroad in the ordinance to use and occupy the Public Landing with an elevated railroad was not effective because it had not been submitted to a vote of the people in accordance with another section of the Revised Statutes, and *second*, that the application of Section 3283*a*, to the Public Landing in Cincinnati, is repugnant to Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of the contract made in January, 1789, by which the Public Landing was dedicated to the use of the inhabitants of the town of Cincinnati forever. (Record, pp. 14-29.)

Later a general demurrer was filed to the amended petition on the ground that the allegations of the amended petition did not constitute a good cause of action. (Record, p. 29.) Upon a hearing the demurrer was sustained and a final judgment dismissing the amended petition

entered (Record, p. 13), the court thereby deciding among other things that Section 3283*a* when applied to the Public Landing in Cincinnati, does not impair the obligation of the contract of January, 1789, dedicating the Public Landing to the inhabitants of the town of Cincinnati forever, and therefore is not repugnant to the provisions of Section 10 of Article I of the Constitution of the United States.

The judgment of the Common Pleas Court was affirmed by the Circuit Court. (Record, p. 12.) On error to this judgment of affirmance, the Supreme Court of Ohio on June 28, 1910, rendered a final judgment, without opinion, against the City of Cincinnati, affirming the judgments of the Circuit and Common Pleas Courts, (Record, p. 31) and whereby it was adjudged that said Section 3283*a* when applied to the Public Landing, is not in conflict with the provisions of Section 10 of Article I of the Constitution of the United States, in that the provisions of said section do not impair the obligations of the contract dedicating the Public Landing to the town of Cincinnati. (Record, pp. 3-4.)

This proceeding is to reverse the final judgment of the Supreme Court of Ohio.

SPECIFICATIONS OF ERRORS.

The errors relied upon for a reversal of the judgment of the Supreme Court of Ohio are as follows:

First. That the Supreme Court of Ohio erred in holding that Section 3283*a* of the Revised Statutes of Ohio, passed by the General Assembly of the State of Ohio on May 9, 1908, when applied to the Public Landing in Cincinnati, Ohio, is not repugnant to, and in conflict with Section 10 of Article I of the Constitution of the United

States, which declares that "no state shall * * * pass any * * * law impairing the obligation of contracts." (Record, p. 5.)

Second. That the final judgment of the Supreme Court of the State of Ohio is repugnant to, and in conflict with said Section 10 of Article I of the Constitution of the United States. (Record, p. 5.)

Third. That said Supreme Court of the State of Ohio erred in holding that under the provisions of Section 3283*a* of the Revised Statutes of Ohio, the defendant in error, The Louisville & Nashville Railroad Company, acquired the right to institute condemnation proceedings for the purpose of appropriating an easement for an elevated railroad across the Public Landing in the City of Cincinnati. (Record, p. 5.)

ARGUMENT.

The dedication to public use forever of the Public Landing in January, 1789, was a contract between the dedicators and the subsequently created City of Cincinnati, by which the latter became perpetually obligated to hold the same in trust for the public; and inasmuch as the power of eminent domain then residing in the Northwest Territory was, by the Ordinance of 1787, limited to cases for the common preservation, no greater power was read into the contract, and therefore the application of Section 3283a to this Public Landing impairs the obligation of said contract and is repugnant to Section 10 of Article I of the Constitution of the United States, which inhibits such impairment.

The Dedication of the Public Landing is a Contract.

That the dedication of the Public Landing in January, 1789, to public use forever, was a contract within the meaning of the Constitution, between the dedicators and the city of Cincinnati, can not be seriously questioned. This court in the case of *Fletcher* v. *Peck*, 6 Cranch, 87, has decided that every conveyance of land is a contract secured by the Constitution. Mr. Chief Justice Marshall, speaking for the court said at page 136:

> "In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?
>
> "A contract is a compact between two or more parties and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing;

such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed, and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed as well as one which is executory contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is therefore always estopped by his own grant.

"Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected."

The law of eminent domain only as it existed at the time of the dedication like all other laws then existing was read into the contract of dedication.

It is at the outset conceded that every contract is made subject to the exercise by the sovereign of its power of eminent domain as it existed at the time when the contract was made. That right is read into every contract and becomes an inseparable part of it.

The doctrine was declared by the Supreme Court of the United States in the cases of *West River Bridge Co.* v. *Dix,* 6 Howard, 507; *Richmond, etc., Railroad* v. *The Louisa Railroad Co.,* 13 How., 69, 82; *Charles River Bridge Co.* v. *Warren Bridge,* 11 Peters, 420; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S., 685, and *Offield* v. *R. R.,* 203, U. S., 372, cited by counsel for the railroad.

There is the difference, however, between those cases and the case at bar: In them the contracts which the court held were not impaired by the exercise of the power of eminent domain, were made in sovereign states vested at the time the contracts were made with the plenary power of eminent domain, and were therefore made with reference to such plenary power. The right of the sovereign to exercise such power at any time thereafter became an implied and inseparable term of the contract, because, as was said by Mr. Justice Daniel in the case of *West River Bridge Co.* v. *Dix, supra,* at page 532:

> "Into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain."

The contracts in those cases having been subject to the plenary power of eminent domain at the time they were

entered into, the subsequent exercise of the right by the sovereign did not impair their obligations, but, to again use the language of Mr. Justice Daniel, "recognized their obligations in the fullest extent, claiming only the fulfillment of an essential and inseparable condition."

In the case at bar, however, as we shall show, when the contract dedicating the Public Landing was made in January, 1789, no power of eminent domain resided in the Northwest Territory, which was not a sovereign but only a dependency of the Confederate states. On the contrary, the only power of eminent domain then existant was that which was conferred upon the territory by the Ordinance of 1787, and which, as we shall see, was limited to the taking of private property only for "the *common preservation,*" in cases of public exigencies.

The power of eminent domain thus limited by the Ordinance of 1787, at the time of the dedication of the Public Landing, to a taking for the "*common preservation,*" was the only power which was read into the contract of dedication, and became an "essential and inseparable condition" in it, for only the law, whether it be the law of eminent domain or any other law, in existence *at the time of making the contract* can be said to become a term or condition of the contract. Such laws only can be "presumed to be known and recognized by all" when entering into the contract. Parties are not presumed to contract with reference to the many and ever-continuing changes in the law of the nation or community, so that such changes shall alter the conditions or terms impliedly read into every contract by virtue of the existing law. Such presumption is repugnant to the constitutional inhibition that "no state shall pass any law impairing the obligation of contracts," and would reduce it, to use the expression of Mr. Webster in the Dartmouth College case, "to mere nonsense."

In the case of *United States, ex rel Von Hoffman,* v. *City of Quincy,* 4 Wallace, 535, the question as to what laws become terms in contracts was discussed. The city of Quincy, Illinois, issued bonds to pay for subscriptions to railroad stock. The acts authorizing the bond issue provided for the levy and collection of a special annual tax upon the real and personal property of the city to pay the interest on the bonds.

Subsequently an act was passed by the Legislature of Illinois, which repealed by implication the act authorizing the levy and collection of a special tax, and limited the tax levy, on the real and personal property to meet and pay the debts and general expenses of the city, to a sum not exceeding fifty cents on every $100 per annum.

This special tax proved insufficient to pay the interest on the bonds and the city made default. Mandamus was brought to compel the city to levy the special tax to pay the interest in accordance with the first act. The city defended on the ground that the second act limited the taxing power.

The Supreme Court held the later act to be a nullity in so far as it affected the bond issue. Mr. Justice Swayne, who delivered the opinion of the court, at page 550, said:

> "It is also settled that the laws which subsist *at the time and place of making of a contract,* and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and endorser to

require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."

After reviewing the authorities, he concluded, on page 555:

"The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the City to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value —and render the protection of the Constitution a shadow and a delusion."

Mr. Justice Baldwin in the case of *McCracken* v. *Hayward,* 2 Howard, 608, discussing this question at page 612, said:

"The obligation of a contract consists in its binding force on the party who makes it. *This depends on the laws in existence when it is made*: these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by remedies then in force. *If any subsequent law affect to diminish the*

duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

A very clear discussion as to what laws do and do not impair the obligation of contracts is found in the case of *Smith* v. *Parsons*, 1 Ohio, 236, at page 240, by Burnet, J.:

"It is admitted that the states have not given up the entire power of legislating on the subject of contracts. They may, for instance, pass laws preventing usury, and fixing the interest of money. Should such a law enact that a lender may receive from a borrower six per cent. interest, and no more, and should an after contract contain an express promise to pay ten per cent., such contract, although voluntarily made for the payment of a specific sum, would be void in part, in many states, the obligation of the contract would be entirely destroyed, and the obligor released from the payment of both principal and interest. Independent of statute law, every person has the same right to contract for ten per cent. interest that he has for the payment of the principal sum; and if the law limiting interest at six per cent. can absolve him from the payment of the excess, and even of the principal itself, is not the obligation of the contract as clearly affected, as it is in the case before us? *It is admitted that such a law, applied to contracts made prior to its enactment, would be unconstitutional; but not so when applied to subsequent contracts.*

Why, it may be asked, does this distinction exist, and why is not this class of laws considered void on constitutional grounds? They evidently affect contracts voluntarily made on subjects about which the parties had a right to contract. One reason only can be assigned. The Legislature has a right, by law, to regulate contracts, to determine their effect, and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract than that it has changed it. If an obligor can be entirely discharged from a contract, by the operation of a statute against usury, and the Constitution be not violated, it would be difficult to assign a reason why that instrument should be violated by a bankrupt law acting prospectively and pointing out a state of things, on the happening of which a contract shall cease to have effect, or shall be considered as discharged. If, however, an attempt should be made to give these laws a retrospective effect, the constitutional objection would arise in all its force; for, although the Legislature may regulate contracts to be made in future, it can not disturb those previously made, or unsettle rights previously vested."

* * * * * * * * * *

In the case of *Goodale* v. *Fennell*, 27 O. S., 426, it was held that:

"Where a statute authorized a municipal corporation to improve its streets, and make assess-

ments on abutting lots to pay the cost thereof, and it has, after taking the necessary steps required by law and the ordinances governing in such cases, made a contract with an individual to do the work for a stipulated price, and binding itself to pay such price in assessments under such statute, which the contractor agrees to accept in full payment, the obligation of the corporation to pay in the manner stipulated can not be impaired by a subsequent amendment of such statute, which takes away the power to make an assessment equal to the amount agreed to be paid.

"A subsequent statute which repeals or restricts the power of assessment so previously given, is, in so far as it affects the obligations of contracts existing at the time, a statute impairing the obligation of such contract."

See also

Sturges v. *Crowningshield,* 4 Wheaton, 122.
Green v. *Biddle,* 8 Wheaton, 1.

Thus it would seem clear that only such laws as are in force at the time the contract is made become terms of it, and that subsequent laws do not apply to previously-made contracts if their effect would be to impair the obligation of the same.

It is true that in the preceding citations the subsequent laws were legislative enactments, while the law which had the effect to enlarge the power of eminent domain for the land now embraced within the state of Ohio is in the form of a constitutional provision.

But constitutional provisions, equally with legislative enactments, come within the inhibition against the impairment of contractual obligations, as is shown by the following authorities—

R. R. Co. v. *McClure*, 10 Wall., 511, at p. 515:

> "The Constitution of the United States declares, Art. I, Sec. 10, that no state shall pass a law 'impairing the obligation of contracts.' *The Constitution of the United States is undoubtedly a law within the meaning of this prohibition.* A state can no more do what is thus forbidden by one than by the other. There is the same impediment in the way of both."

Shreveport v. *Cole*, 129 U. S., 36, at p. 42:

> "But it is perfectly clear that the rights of antecedent contract creditors are protected by the Constitution of the United States, and they are entitled to have them enforced 'in all respects as if' this provision of the Constitution 'had not been passed.' *Von Hoffman* v. *Quincy*, 71 U. S. (4 Wall.), 535. *The fact that the act of the state is a constitutional provision instead of a mere legislative act does not affect the case.*"

Gunn v. *Barry*, 15 Wall., 610, at p. 623:

> "A state can no more impair an existing contract by a constitutional provision, than by a legislative act; both are within the prohibition of the National Constitution."

Fisk v. *Jefferson Police Jury*, 116 U. S., 131, at p. 135:

> "It is well settled that a provision in a State Constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute."

See also

County of Clay v. *Society for Savings*, 104 U. S., 579.

Dodge v. *Woolsey*, 18 How., 331.

Matheny v. *Golden, Treasurer,* 5 O. S., 369, Brinkerhoff, J., states the principle at pages 371-2, as follows:

> "Again this legislation is attempted to be justified by an argument drawn in some way—we confess to us not very intelligible—from the fact that, since the making of the contract set forth in the bill, the state has effected a peaceable revolution; or, in other words changed its Constitution, and that the statutes complained of are in conformity to the express requirements of that Constitution. Now, granting, for the sake of argument, that the facts are as claimed, let us inquire: Does a change of Constitution annul contracts? Does a resolution, whether peaceful or violent, justify or excuse repudiation? Certainly not. Were the United States less bound for the faithful payment of their debts, contracted to the government of France and the bankers of Amsterdam during the war of the revolution, on account of the substitution of the present Constitution of the United States for the old articles of confederation? Has France any more or better right to resume the power of taxation, or any other sovereign power over Louisiana, in the face of her solemn contract to the contrary, from the fact that her brilliant but volatile people have, since that time, seen proper to change her Constitution with every changing moon? If she were to attempt it, the law of nations—the code of international morality, sanctioned and enforced by the general conscience of Christendom—would denounce the just penalty of war against her. And is the obligation of a contract less sacred, because one of the parties to it is an humble individual, incapable of vindicating himself with a strong hand? In the case before us, no penalty accrues, no war results; and yet injustice is allowed. The Constitution of the United States

interposes its potent veto, avoids the very act of repudiation, and leaves the obligations of the contract unimpaired.

"To frame a new state Constitution, is but to 'pass a law'— a law more solemn and formal in the mode of enactment, to be sure, and passing under the more direct supervision of the constituent body, the people—but still a law, and like any other law, subject to the supremacy of the Constitution of the United States, and a nullity when in conflict with the provisions of that instrument."

Does it not inevitably follow from the principle of these decisions that the inviolability of contracts is vouchsafed against all subsequently enacted laws, even those found in state Constitutions?

By what process of reasoning, then, can it be said that the contract which fixes the perpetual use to which the land in question shall be put, can, by subsequent enlargement of the power of eminent domain be taken for a different use?

The inhibition against the impairment of contractual obligations is found in all the fundamental laws of the country from the beginning, and is absolute.

The Supreme Court of Ohio, in speaking of the absolute character of these provisions in the case of *Toledo Bank* v. *Bond*, 1 O. S., page 623 on page 687, said:

"The restrictive clause in the Constitution of the United States inhibiting the enactment of any law by state authority, impairing the obligations of a contract, contains no qualification, and does not except the case of the exercise of the right of eminent domain, or any other instance of public emergency. * * * The Constitution does not prohibit a state from impairing the

obligations of a contract unless compensation be made; but the inhibition is absolute."

It should always be borne in mind that the contract in the case at bar does not fall within the class of contracts that are made under a government then possessing the power of eminent domain, which is asserted against the contract, but was made under a government, whose power of eminent domain was limited to the "common preservation" in cases of public exigencies.

It is argued, however, that the government of the Northwest Territory was regarded as temporary only, soon to be formed into states which by the provisions of the Ordinance were to be admitted into the Union on an "equal footing with the original states, in all respects whatever," and which would have the inherent power of eminent domain. This, they say, was contemplated by the dedicators, and therefore the inherent power of eminent domain, which by the creation of the state of Ohio sprang into existence unlimited by its Constitution save that compensation should be made, became a written term of the contract of dedication, and therefore a subsequent exercise of the power of eminent domain can not be said to impair the obligation of that contract.

We think counsel misconstrue the phrase "equal footing with the original states in all respects whatever." It does not mean that each new state had to come into the Union with its inherent power of eminent domain unabridged and unlimited, or with its power of eminent domain the same as the original states. It means that with respect to the National Government they must be on an equal footing with the original states. The new states must have the same obligations toward the National Government, and are entitled to the same privileges as

the original states. For instance, the new states must surrender to the National Government the sovereign right to coin money, regulate interstate commerce, control navigable waters, declare war, etc., the same as did the original states. In all other respects each state is supreme within her own territorial limits, free to frame her own Constitution, enact her own laws, abridge her sovereignty, and therefore to limit her inherent right of eminent domain even to cases for the "common preservation" if she so desires, or in any other respect.

Matheny v. *Golden, Treasurer*, 5 O. S., 369, at page 370, where Mr. Justice Brinkerhoff used the following language:

> "But I deny that a state may not surrender a portion of her sovereignty. For a good and sufficient consideration, states may do it—states have done it—and the whole line of history is dotted with examples of such surrender. Great Britain surrendered her sovereignty over this vast empire, France hers over Louisiana, and Mexico hers over California. They surrendered not only the power of taxation, but every other sovereign power, over vast territories. Ohio, in this case, for a good consideration to her in hand paid, abdicates the right to tax two townships of land."

In *Case* v. *Toftus*, 39 Fed., 730, at 732, the court construing the phrase "equal footing" said:

> "The true constitutional equality between the states only extends to the right of each, under the Constitution, to have and enjoy the same measure of local self government, and to be admitted to an equal participation in the maintenance, administration and conduct of the common or national government."

If she were not free in these respects she would not be on an equal footing with the other states, each of which is supreme as to her own rights of sovereignty, save only to the extent that she has surrendered a portion of it to the Federal Government. Their argument if carried to its logical conclusion would be that in each of the original states the power of eminent domain was precisely the same, that one state could not impose any limitations upon her power of eminent domain unless every other state did likewise, and that a new state upon her admission could not impose a limitation upon her right of eminent domain which had not been also imposed by all of the other states. It would mean that the Constitutions of all the states, not only with regard to eminent domain, but in all other respects, would have to be alike.

Such an argument strikes at the very foundation of the theory of our National Government that each state is supreme within her own limits, and being supreme is absolutely free to abridge or limit her sovereign powers, including her power of eminent domain.

The Supreme Court of Ohio in a very recent case has refused to give this phrase the broad meaning which counsel in the case at bar seek to attach to it.

In *State* v. *Boone,* 84 O. S., 346, at page 359, the court, after quoting that phrase of the Ordinance of 1787, say:

> "Whatever that clause may mean, it certainly does not mean that *all state constitutions shall be, or are, alike,* nor that a new state erected in the northwest territory shall be understood to surrender all the guaranties of the compact as a condition of admisison as a state."

The same construction was given that phrase in the case of *Spooner* v. *McConnell,* 1 McLean, 337 (Federal case No. 13245), McLean, J., saying at page 348:

"Does this provision mean, that the new state shall exercise the same powers and in the same modes, as are exercised by any other state.

"Now this can not be the true construction of the provision, for there can not be found perhaps any two states of the Union whose legislative, judicial and executive powers are in every respect alike. If the argument be sound, that there is no equal footing short of exact equality in this respect, then the states are not equal. But if the meaning be, that the people of the new state, exercising the sovereign powers which belong to the people of any other state, shall be admitted into the Union, subject to such provisions in their fundamental law as they shall have sanctioned; within the restrictions of the Federal Constitution, then the states are equal. Equal in rank, equal in their powers of sovereignty; and only different in their restrictions, which in the exercise of those powers, they may have voluntarily imposed upon themselves. Thus a state may, in her Constitution, prohibit the Legislature from incorporating banks, or in fact from passing any act of incorporation, and yet this state would be admitted into the Union on an equal footing with the other states."

In support of this contention that Ohio in order to be admitted on an equal footing with the original states, had to be possessed of the same power of eminent domain as each of those states, counsel cite the cases of

Escanabo v. *Chicago*, 107 U. S., 678, at 698.
Huse v. *Glover*, 119 U. S., 543, at p. 546.
Land v. *Manistee River Imp. Co.*, 123 U. S., 288, at p. 295.
Coyle v. *Smith*, 221 U. S., 559, and other cases to the same effect.

The first three involved the right of the states formed in the Northwest Territory to legislate concerning the navigable streams entirely within the states. In each it was held that the states have complete control over their navigable waters except in so far as Congress has legislated concerning them.

With respect to the claim that the clause in the Ordinance of 1787 providing that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States and those of any other states that may be admitted into the Confederacy, without any tax, impost or duty therefor" was binding upon those states formed out of the Northwest Territory after their admission into the Union, it was held that upon the admission of those states the Ordinance ceased to have any binding force except in so far as the provisions of the Ordinance were adopted by such states, and that such new states possessed the same control over the navigable waters in the Northwest Territory as was exercised by the original states over the navigable waters within their confines. That in order to be on an equal footing with the original states the new states became entitled to be possessed of the same rights with respect to their navigable waters as did the original states with respect to theirs.

These cases by no means decide that each new state had to enact the same laws as to its navigable waters as were enacted by the original states. That would be depriving such new states of their full right of sovereignty. The original states were sovereignties and possessed all of the consequent rights of sovereignty, which means nothing more than that they are supreme in their own

territory. The new states to be on an equal footing became endowed with the same attributes of sovereignty and the same supremacy in their territory, and were free to exercise it as they saw fit.

A sovereignty is defined by Andrews in his manual of the Constitution as follows:

> "A political community, independent of all others, framing its own Constitution, and enacting its own laws without hindrance or question from any other—in short, a body politic, with no political superior, is a sovereign or nation."

Unquestionably each new state upon its admission could have adopted that clause of the Ordinance with regard to navigable waters, and still have been on an equal footing with the other states even though such states had made no provision as to navigable waters. This is clear from the language of Mr. Justice Field in the case of *Land* v. *Manistee River Imp. Co.*, 123 U. S., 288, at p. 295:

> "Yet from the very conditions on which the states formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative *except as adopted by them.*"

The case of *Coyle* v. *Smith*, **221** U. S., **559**, instead of being an authority in favor of the railroad, recognizes the right of a state to be supreme in its own territory after its admission into the Union. That case decided that the provision in the enabling act for the admission of Oklahoma into the Union on an equal footing with the original states that the capital of the state shall temporarily be at the city of Guthrie, and shall not be changed therefrom previous to 1913, although accepted by an irrevocable ordinance ceased to be a valid limitation upon

the power of the state after her admission, and could not override any subsequent state legislation. The Court therefore upheld the act of the Legislature of Oklahoma providing for the removal of its capital from Guthrie to Oklahoma City before 1913, on the ground that to deny the state of Oklahoma the right to determine for herself the location of her capital would be to take away a portion of her sovereignty, and thereby place her on an unequal footing with the original states all of whom could determine and change the location of their respective capitals.

In speaking of the supremacy of the states of the Union, Mr. Justice Lurton at p. 567 says:

> " 'This Union' was and is a union of states, equal in power, dignity and authority, *each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.* To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a Union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."

And again at page 579:

> "Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she can not."

So also did the state of Ohio on her admission, have the right, by reason of her sovereignty, to impose any

limitation she desired upon her power of eminent domain. She did impose the one limitation, that compensation must be made before the appropriation, and with equal right she could have limited her power of eminent domain to any other extent even to cases where "the public exigencies made it necessary for the common preservation." To have denied to her the right to limit her power would have been to take away a portion of her sovereignty and thereby render her unequal in power to the other states.

That right of the state to alter or abridge the power of eminent domain by a change in the Constitution was recognized by the Supreme Court of Ohio in the case of *Toledo Bank* v. *Bond*, 1 O. S., 622, where Mr. Chief Justice Bartley said at p. 688:

> "It is said that the right of eminent domain is essential to the accomplishment of the great object of government and can not be parted with or abridged. Equally so is the right of legislative control over existing laws. These are both high prerogatives of sovereign authority, essential for the protection and advancement of the public welfare, and neither can be parted with or abridged by contract or otherwise, *without an alteration of the fundamental law of the state.*"

It follows that while it was known by the dedicators that this portion of the Northwest Territory would some time in the future be erected into a state, it was not known what limitations upon her power of eminent domain her constitution would contain. Such a degree of prescience is not an attribute of mankind, not even of the sturdy settlers of the Northwest Territory.

An argument which exacts from contracting parties such precise knowledge of the terms of future state Con-

stitutions, and requires contracts to be made with reference thereto, rests, to say the least, upon a precarious foundation.

The proposition if sustained would annul the inhibition against the passage of laws impairing the obligation of contracts. Of equal importance with the sovereign right of eminent domain is the sovereign right of the state to alter her laws. If the state may alter her limitations upon her power of eminent domain so as to affect existing contracts, why may she not alter her other laws with the same effect?—but if she may, then the constitutional inhibition against impairment of contracts becomes a nullity. That contracts should be immune against subsequent legislation, is one of the most beneficent principles engrafted in the Ordinance and the Constitutions of the United States.

One of the highest prerogatives of sovereignty is the right to levy and collect taxes. This right is known to every contracting party when entering into a contract, and yet if at the time the contract is made that power has been abridged by the sovereign, such abridgment becomes a term in the contract by which the obligation thereof is fixed, and any subsequent enlargement of the taxing power, either by an act of the Legislature, or an amendment of the Constitution, would be within the constitutional inhibition.

In the case of *Dodge* v. *Woolsey*, 18 How., page 331, the complainant was a stockholder of a bank chartered under the banking act of the state of Ohio passed in 1845, while the Constitution of 1802 was in operation. By that act the state limited her power to tax corporations formed under it, to six per cent. of the profits, less expenses and ascertained losses, which was to be in lieu

of all taxes to which the company, or the stockholders would otherwise be subject.

The Constitution adopted in 1851 provided that laws shall be passed, taxing by a uniform rule the property, effects and dues, without deduction, of all banks then existing, or thereafter to be formed, so that all property employed in banking should always bear a burden of taxation equal to that imposed on the property of individuals.

In 1852 the General Assembly, pursuant to the constitutional provision, passed an act for the taxation of all property in the state according to its true value in money.

The tax imposed on the bank by this act amounted to $14,771.87, while the tax to which it would have been subject under the act of 1845, would have been but $3,206.65.

The Supreme Court held that the imposition of the tax under the later act would impair the obligation of the contract, and therefore could not apply to the banks chartered under the act of 1845.

Mr. Justice Swayne, speaking for the Court at p. 360, said:

> "A change of Constitution can not release a state from contracts made under a Constitution which permits them to be made. The inquiry is, is the contract permitted by the existing Constitution? If so, and that can not be denied in this case, the sovereignty which ratified it in 1802 was the same sovereignty which made the Constitution of 1851, neither having more power than the other to impair a contract made by the State Legislature with individuals. The moral obligations never die. If broken by states and nations, though the terms of reproach are not the same with which we are accustomed

to designate the faithlessness of individuals, the violation of justice is not the less."

Thus while the parties to the contract knew at the time that the sovereign had the right to enlarge her power of taxation either by a legislative enactment or by the adoption of a new Constitution, that power to enlarge was not read into the contract.

How then can it be said that because of the dedicators' knowledge that a new state was to be formed, the contract of dedication was made subject to whatever power of eminent domain the new state should by its Constitution retain? The right to enlarge or limit the taxing power is as great as the right to enlarge or abridge the power of eminent domain.

Nor is the power of eminent domain any greater than the right of a state to alter or destroy her municipal corporations, either by constitutional change or legislative act. Each is an attribute of sovereignty, and yet this Court has held that such alteration or destruction is within the constitutional inhibition against impairing the obligation of contracts.

Graham v. *Folsom*, 200 U. S., 248:

Mr. Justice McKenna, speaking for the Court, said at page 253:

"The power of the state to alter or destroy its corporations is not greater than the power of the state to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily undertaken than the abolition of townships, or the change of their boundaries or the boundaries of counties. The latter may put on the form of

a different purpose than the violation of a contract. But the courts can not permit themselves to be deceived. * * *

"*Mt. Pleasant* v. *Beckwith*, 100 U. S., 514, and and *Mobile* v. *Watson*, 116 U. S., 289, are cases in which municipal corporations had incurred indebtedness, and afterward their municipal organization was destroyed and their territory added to other municipalities. It was argued in those cases, as it is argued in this, that such alteration or destruction of the subordinate governmental divisions was a proper exercise of legislative power, to which creditors had to submit. The argument did not prevail. It was answered, as we now answer it, that such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States which forbids a state from passing any law impairing the obligation of contracts. See also *Shapleigh* v. *Los Angeles*, 167 U. S., 646. And this is not a limitation, as plaintiffs in error seem to think it is, of the legislative power over subordinate municipalities, either over their change or destruction. It only prevents the exercise of that power being used to defeat contracts previously entered into."

It is submitted that only the power of eminent domain as it existed in the Northwest Territory at the time of the dedication in January, 1789, was read into the contract of dedication, and that the exercise of any different power of eminent domain, if it impairs the obligations of that contract, is forbidden by the United States Constitution.

What, then, was the nature and extent of the power of eminent domain in the Northwest Territory in January, 1789, when the dedication was made, and which became an "essential and inseparable condition" of it?

The only power of eminent domain in the Northwest Territory under the Ordinance of 1787, was where "the public exigencies made it necessary for the common preservation."

The power of eminent domain may be either inherent or delegated, inherent in every political sovereignty as an incident, and no instrument is necessary to confer it. On the other hand, unless there is sovereignty, there is no inherent power of eminent domain. So also the power is not necessarily the same in every sovereignty, but is only commensurate with, and incidental to, the nature of the sovereignty. We find an illustration of this in the difference between the power of eminent domain of the states and of the Federal Government. Each possesses sovereignty, but of a different character. Thus the sovereignty of the states is unlimited save by the fundamental law of its creation, its constitution, while the sovereignty of the United States is only that which the states, by virtue of the powers enumerated in the Federal Constitution surrendered to the United States Government. The sovereignties being different, the power of eminent domain of each is likewise different, so that, while that of the states is practically unlimited, the power of eminent domain of the Federal Government is only that which is necessary in carrying out the powers expressly or impliedly granted by the states in the Federal Constitution, as, for instance, acquiring land for post-offices, forts, arsenals, etc.

Luxton v. *North River Bridge Co.*, 153 U. S., 525; 38 L. Ed., 808.

Chappel v. *United States*, 160 U. S., 499; 40 L. Ed., 510.

Van Brocklin v. *Tennessee*, 117 U. S., 151; 29 L. Ed. 845.
United States v. *Gettysburg Electric Ry.*, 160 U. S., 668; 40 L. Ed., 576.

Where a political community is a dependency as distinguished from a sovereignty, having no inherent power of eminent domain, it may acquire the power by delegation from the sovereignty to which it is a dependency. Thus the power of eminent domain inheres in the Federal Government and the states by virtue of their sovereignty, while it does not inhere in the territories of the Federal Government, which, instead of possessing sovereignty, are mere subordinate political divisions or dependencies of the Federal Government, and therefore have only such power of eminent domain as is delegated to them.

It follows that since the Northwest Territory was a dependency of the Confederacy, without sovereignty, it possessed no inherent power of eminent domain but only such power as was in some way conferred upon it.

Before its cession to the confederated states the territory northwest of the river Ohio belonged to the state of Virginia. As to it she had the sovereign power of eminent domain which was incidental to the sovereignty which she derived from the following portion of the Declaration of Independence:

> "We, therefore, the Representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do in the name and by the authority of the good people of these Colonies, solemnly publish and declare, That these United Colonies are, and of right ought to be free and independent states;

that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And, for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honor."

What, then, became of the plenary power of eminent domain which Virginia possessed over this land prior to the formation of the territory northwest of the river Ohio?

By the deed of cession the sovereign power of eminent domain would have passed from Virginia to the Confederated States had it not been for the Ordinance of 1787. By this compact the power of eminent domain in the Northwest Territory was fixed, and could not be exercised except as conferred by the Ordinance. Beyond that it did not exist. Nor did the state of Ohio upon her admission acquire her right of eminent domain by succession from either Virginia or the Confederated States. Her right sprang into existence as an inherent incident to the sovereignty with which she became invested by reason of her erection into a state.

The only provision in the Ordinance of 1787 conferring the power of eminent domain upon the Territorial Legislature is found in Article II and reads as follows:

"No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public ex-

> igencies make it necessary, *for the common preservation*, to take another person's property, or to demand his particular services, full compensation shall be made for the same."

This was a distinct grant of power, and not a limitation upon power already existing.

The phrase "should the public exigencies make it necessary for the *common preservation*, to take any person's property or to demand his particular services, full compensation shall be made for the same," certainly did not confer general and unrestricted power of eminent domain. That, we think, is clear. Nor did counsel for the railroad in the hearings below contend that such power existed in the Northwest Territory by virtue of that provision. It clearly restricts the right to take private property to such occasions when "the public exigencies make it necessary for the *common preservation.*" It has reference exclusively to that extraordinary exercise of governmental power in cases where legislative and judicial action would be too slow to meet the exigencies of the occasion, as where property is taken during times of war or public danger.

The power of eminent domain was not conferred by the provision that "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land."

It is argued, however, by counsel for the railroad, that the power of eminent domain was conferred upon the people of the Northwest Territory by the provision of Article II that "no man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land."

This phrase was borrowed from the 29th chapter of the Magna Charta providing that "no freeman shall be seized or imprisoned, or dispossessed or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land," and is synonymous with the phrase "due process of law" in the fifth article of the amendments to the Constitution of the United States providing that "no person shall * * * be deprived of life, liberty or property without due process of law."

Den v. *Hoboken Land & Imp. Co.*, 18 How., 272, at page 276, where Mr. Justice Curtis said:

> "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Charta. Lord Coke, in his commentaries on these words (2 Inst., 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words 'but by the judgment of his peers, or the law of the land.' The Ordinance of Congress July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the words.
>
> "The Constitution of the United States, as adopted, contained the provision, that 'the trial of all crimes, except in cases of impeachment, shall be by jury.' When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases.

> To have followed as in the state constitutions, and in the Ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty or property, but by the judgment of his peers or the laws of the land, would have been in part superfluous and inappropriate. To have taken the clause 'law of the land,' without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta had declared was the true meaning of the phrase, 'law of the land,' in that instrument, and which were undoubtedly then received as their true meaning."

The phrase "due process of law" has been variously defined, but it is now well settled that it has reference to ordinary judicial proceedings in court. "Due process of law" was defined by Mr. Justice Field in the case of *Hagar* v. *Reclamation District,* 111 U. S., 701, at page 708, as follows:

> "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

This definition was quoted with approval by Mr. Justice Brown in *Turpin* v. *Lemon,* 187 U. S., 51, at page 58.

Mr. Justice Matthews in *Hurtado* v. *California,* 110 U. S., 516, at page 537, defines "due process of law" thus:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age, and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Perhaps the best definition of "law of the land" was given by Mr. Webster in his argument in the Dartmouth College case, 4 Wheaton, 518, at page 581, and which has been often quoted and approved:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society."

That phrase has never been regarded as the *source* of private rights or governmental powers, but rather as a limitation upon the exercise of rights and powers. It presupposes the existence of a right or power and is intended to insure to the party against whom the right or power is sought to be exercised the right to a judicial determination thereof. It does not *confer* the right of eminent domain, but rather guarantees a proper and legal exercise of the right when it exists either inherent or conferred. It means that when the right to take property for public use exists, the manner and method of the tak-

ing must be in accordance with the laws prescribing the procedure in condemnation cases. To such laws must we look in determining whether when property is taken, it is by "due process of law," within the meaning of the Constitution, or by "the law of the land" under the Ordinance of 1787.

That the Federal Government did not acquire the power of eminent domain by virtue of the fifth amendment to the Federal Constitution can no longer be questioned. This court has decided that the fifth amendment is but a limitation upon the power of eminent domain which inheres in the Federal Government as an incident to the sovereignty which was surrendered to it by the states, and does not confer the power.

Boom Co. v. *Patterson*, 98 U. S., 403.
United States v. *Jones*, 109 U. S., 513.

If, then, the fifth amendment did not confer the power of eminent domain upon the Federal Government, but is only a limitation upon the power which it has, then inasmuch as the phrase "no person shall be deprived of his life, liberty or property without due process of law" is synonymous with the phrase in the ordinance "no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land," it follows that the power of eminent domain was not delegated to the Northwest Territory by this phrase in the Ordinance, which phrase can be given no broader interpretation than the phrase in the Federal Constitution.

And since the Northwest Territory being a dependency had no more power than was delegated to it, the conclusion is inevitable that the only power of eminent domain in the Northwest Territory was where the public exigencies made it necessary for the common preservation.

Another reason for the claim that the power of Eminent Domain was limited to a taking for the common preservation.

There is another excellent reason for the position that by Article II of the Ordinance the power of eminent domain was limited to a taking for the *"common preservation."*

It will be noticed that where property is authorized to be taken when "the public exigencies make it necessary for the *'common preservation'* to take any person's property," "full compensation shall be made for the same." But if the contention of counsel for the railroad that the Northwest Territory acquired the unlimited power of eminent domain from the provision that "no man shall be deprived of his liberty or property, but by the judgment of his peers, or the *law of the land,"* or in any other way, should prevail, then the Ordinance makes no provision that compensation must be made for such a taking.

Thus the framers of the Ordinance by express provision safeguarded the rights of the people by insuring compensation when their property is taken for the *"common preservation,"* while no such restriction is made with reference to taking private property for other public uses.

It is perfectly apparent, however, that the taking for the *"common preservation"* is for a higher use than the taking for other public purposes, and yet unless the construction of Article II of the Ordinance urged by us is adopted the very strange situation arises that compensation must be paid for property taken for the *"common preservation,"* the highest exercise of the right to take private property, while no compensation need be made for the taking for any lesser purpose.

To ascribe to the framers of the Ordinance such an unreasonable intention would be to sound the first note of opposition to the oft-expressed opinion that the Ordinance of 1787, like the Federal Constitution, is one of the most remarkable productions of legislative wisdom found in the annals of the world. This seems all the more unreasonable from the fact that the Ordinance was passed by the Confederate Congress in the same year that the Federal Constitution was adopted by the same body, although the latter did not go into operation until its ratification by the States in 1789. Some of the framers of the Ordinance were also framers of the Constitution. Yet in the latter the right of the sovereign to take private property for the common preservation, as well as for all other public purposes, is recognized, and compensation is insured in both instances, while the Ordinance did not provide for the taking for uses other than for the *"common preservation,"* nor was compensation insured for the taking for other uses.

The reason is clear. The United States after the adoption of the Federal Constitution had the inherent power of eminent domain, and to guard against the arbitrary exercise of the power, compensation was secured to the owner, and the taking had to be "by due process of law." The Northwest Territory, on the other hand, had no power of eminent domain except for the "common preservation" and there was, therefore, no need for a provision for compensation except when taken for the common preservation.

The case of Newcomb v. Smith.

After considerable research, we have been able to find but a single discussion of that part of Article II of the

Ordinance of 1787, which, by our contention, limits the territorial power of eminent domain to cases of the common preservation, and that is found in the case of *Newcomb* v. *Smith*, 1 Chandler (Wis.), page 71.

This case involved the constitutionality of an act of the Territorial Legislature of Wisconsin, passed January 13, 1840, by which authority was given to any person to erect and maintain a water mill dam to raise water for working it upon and across any stream that was not navigable.

The act further provided that any person whose land is overflowed, or otherwise injured by such dam, might obtain compensation therefor, upon his complaint before the District Court for the county where the land lies, and also prescribed the mode of proceedings in such court and estimating damages by a jury trial, and judgment of the court.

The plaintiff filed a complaint alleging damages to his land by reason of the erection of a mill dam by the defendant and praying for an assessment of his damages.

The defendant filed a motion to dismiss the complaint on the ground "That the act of the Legislative Assembly upon which the proceedings in this case are based, is unconstitutional and void, the same being in contravention of the Constitution of the United States, the Ordinance of 1787, and the Constitution of Wisconsin."

The lower court granted the motion and dismissed the case, presumably holding the act void. The Supreme Court by a vote of three to two, the Chief Justice siding with the minority, held the act valid and reversed the court below.

The point of difference between the two parts of the court was not one which concerns vitally the question before us. The majority opinion assumed, without dis-

cussion, that the act establishing the territorial government of Wisconsin conferred upon the Territory of Wisconsin the general power of eminent domain subject to the provision in the United States Constitution, that private property shall not be taken for public use without just compensation; while the minority judges held, that the Ordinance of 1787 as the fundamental law of the territory up to the time of its erection into the state of Wisconsin, must be looked to in determining the validity of the act under discussion, and then proceeded to discuss most learnedly, not only its reasons for so holding, but also the extent of the power of eminent domain prevailing in the territory by virtue of the ordinance, and it is this latter discussion by Judge Larrabee, and which is not opposed by anything found in the majority opinion, to which we wish to direct the court's attention. We quote beginning at page 88:

> "Let us inquire what rights *were* secured to the people of Wisconsin—in what cases the Legislature could authorize the seizure of private property, even for the use of the government—for the 'public use,' if you please. It will be refreshing, to say the least of it, to examine the principles of the ordinance, and see if we can find anything which will warrant the high stretch of legislative power which this act bears upon its face.
>
> "The second article of the compact is as follows: 'The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and the trial by jury; of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate;

and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide,* and without fraud, previously formed.'

"Here we have, in comprehensive language, the strongest and most sacred guaranty of the enjoyment of rights and property. It is more expressive than *Magna Charta,* or even the Constitution of the United States. *Magna Charta* provides that 'no freeman shall be disseized or divested of his freehold or his liberties, but by the judgment of his peers, or the law of the land.' The Constitution, 'that no person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation;' while the Ordinance declares that 'no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should *the public exigencies make it necessary for the common preservation,* to take any person's property, or to demand his particular services, full compensation shall be made for the same.' This restriction upon legislative power, it will be seen at once, is far more stringent than the provision of the Constitution. In one case, the taking of private property is authorized only when the public exigencies shall make it necessary for the common preservation;

in the other, whenever the *public use* shall require it. Under the former, the act could be justified only in case of imminent danger to the government itself; under the latter, whenever the sovereign may need property in the ordinary relations of government—for lighthouses, harbors, etc. The restriction upon the exercise of the right of eminent domain is widely different in the one case, from that in the other. We also see the same restriction thrown around the person; for no man's services could be demanded by the government unless the common preservation required them, and only then upon full compensation.

"But as the act of 1840 is sought to be justified, on the ground that the person whose property is authorized to be taken by its provisions, is deprived of it only by 'the judgment of his peers, or the law of the land,' it will be necessary to exanine still further this provision of the Ordinance. It will be observed that there is a strict analogy between the provisions as found in the Ordinance, and in the Constitution. That branch which provides that no person shall be deprived of liberty or property, but by the judgment of his peers, or the law of the land, is a distinct right, independent of that secured in the latter clause. It secures to every man his liberty and property from the mere arbitrary encroachments of private persons. When, from his own act or negligence, or the act or negligence of another, he shall be brought within the control of a court of justice, then, he shall not lose his liberty or property, but by the judgment of his peers or the law of the land. He well knows what that 'law' is; for, in another branch of the same article, he is given the right to 'judicial proceedings, according to the course of *the common law*.' This branch of the article, then, guarantees the right of property in the strong-

est manner; and guarantees the right of trial by jury according to the course of well-defined and existing law. It can have no reference to that sovereign right of eminent domain, by which the government, under certain restrictions, justifies the appropriation of private property for public purposes, and is no restriction upon it; for, if it were, whence the necessity of the latter clause? The first guarantees the right of liberty and property; the second is a restriction, and the only restriction upon the exercise of the right of eminent domain. Care must be taken not to confound the two provisions, for they certainly have no connection with each other. The first is no more a restriction upon the exercise of the right of eminent domain, than the latter is a restriction upon the legal forfeiture of liberty or property for any cause known to the law.

* * * * * * *

"It follows, then, that under the fundamental law of the Territory of Wisconsin, as has been repeatedly held by the Federal and State Courts, in relation to the analogous provisions of the Constitution of the United States, that the only provision in any way authorizing the taking of private property for the use of the government, is the one which relates to the 'common preservation.'

"This provision was just as much a part of the fundamental law of the territory, and just as restrictive of legislative power, as that noble and original principle immediately following, which declares that 'in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever, interfere with or affect private contracts or engagements *bona fide*, and without fraud, previously formed;' a provision,

which, it may be justly feared, the law-making power has overlooked, in an act of more recent date.

"If, then, in the examination of the question presented in this case, we shall lay aside entirely, as a matter with which we have nothing to do, the phraseology of the Federal Constitution, and confine ourselves to the powers of the territorial Legislature as they are found in the Ordinance and acts of Congress, we shall escape the whole train of false premises and reasoning, by which this law is sought to be sustained. If we but keep in view, that if the territorial Legislature had power to take private property at all, it could only take it when the *public exigencies made it necessary for the common preservation* —that this was the only emergency upon which it could decide, and that it had not the whole range of objects for legislative construction, and the term 'public use'—from a state canal down to a private mill dam—we shall have no difficulty in coming to a correct conclusion." [*The italics are by the court.*]

It is submitted that the reasoning of Judge Larrabee fully sustains our own contention that the power of eminent domain prevailed in the Northwest Territory only to the extent that its exercise was necessary for the *common preservation*, and that this was so in that part of it embraced within the subsequently formed state of Ohio until the adoption of the Ohio Constitution.

The Act of December 13, 1799.

Counsel have referred to an act of the territorial General Assembly prescribing the method of taking private property for road purposes, to show that the General

Assembly believed itself clothed with the power of eminent domain beyond the "common preservation."

It is sufficient to say in regard to this act that the power of the General Assembly to pass it was not contested, therefore the validity of the act was never presented for judical determination. It is well known that law-making bodies frequently exceed their authority. The Council of Cincinnati by ordinance gave this same Public Landing to this same railroad for the same purpose claiming to act under the authority of Revised Statutes, 3283, but the Supreme Court of Ohio (76 O. S., 481) held that neither the city council nor the Legislature possessed the power to do so. But for the contest which resulted in that decision the aforesaid city ordinance would stand as evidence of the city's and the state's authority to make a gift to the railroad of property which it held in trust for the public.

The power of eminent domain was not conferred on the Northwest Territory by the provision in the Ordinance that "the governor, legislative council and house of representatives shall have authority to make laws in all cases for the good government of the district," etc.

Since writing the foregoing, and while it was in the hands of the printer, we have been furnished with a typewritten copy of the brief for defendant in error, in which counsel practically abandon their claim heretofore made that the power of eminent domain was conferred upon the Northwest Territory by the provision in the ordinance that "no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land," and for the first time assert that such power was

conferred by the provision that "the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the *good government* of the district, *not repugnant to the principles and articles in this ordinance established and declared.*"

It will be observed that the delegation of the power to make laws is limited to cases for the good government of the district. Can it be said the exercise of the power of eminent domain was necessary to the good government of the district during the time the Ordinance was in force? The district was almost entirely inhabited by hostile and savage Indians, and it was primarily to control those inhabitants and prevent their ravages, and secondarily to enact other civil and criminal laws for the good government of the district, that this power was given.

Surely if it had been intended that this provision should confer the power of eminent domain, the framers of the Ordinance would in their wisdom have provided that compensation should be made upon the exercise of the power, for the same reason which prompted them to provide for compensation where property was taken for the common preservation, as has been argued under the previous heading, entitled "Another reason for the claim that the power of Eminent Domain was limited to a taking for the common preservation," which argument applies here with equal force.

Again from the conditions of things in the Northwest Territory, there was no necessity for the existence of the power of eminent domain, for it must be remembered that nearly all of the land was owned by the Indians or the Confederated States, the latter having the right under the Ordinance to the primary disposal of the soil. As to the Indians, it was provided in Article III, that their lands "shall never be taken from them *without their consent.*" Thus the ownership of the land that could

be used was in the sovereignty, and being there the right of eminent domain was of no necessity.

Moreover can any reason be assigned why the land of the Indian should be immune against exercise of the power of eminent domain while the land acquired by the other inhabitants from the sovereign was subject to that power?

It is submitted therefore that the power which existed in the Northwest Territory under the Ordinance of 1787, and at the time of the dedication in January, 1789, and which became a term of the contract, was to take private property for the *"common preservation"* only; and that therefore Section 3283*a* if it is applied to the Public Landing in question is unconstitutional and void, in that by such application the obligation of the contract of dedication is impaired in contravention of the Federal Constitution, and the judgment of the Supreme Court of Ohio to the contrary should be reversed.

Respectfully submitted,

EDWARD M. BALLARD,
City Solicitor.
ALBERT BETTINGER,
Attorneys for Plaintiff in Error.

January 4, 1912.

APPENDIX.

CHRONOLOGY OF IMPORTANT EVENTS.

1784, March 1st—Cession by Virginia of Northwest Territory.

1784, April 23d—The First Resolution by Confederate Congress with respect to Northwest Territory.

1787, July 13th—Ordinance of 1787 passed by Confederate Congress.

1787, September 17th—Federal Constitution passed by Confederate Congress.

1789, January—Public Landing dedicated.

1789, March 4th—Federal Constitution began operation.

1802, November 29th—Ohio admitted as a state.

1802, November 29th—First Constitution of Ohio adopted.

COPY OF RESOLUTION OF CONGRESS WITH RESPECT TO NORTHWEST TERRITORY, PASSED APRIL 23, 1784.

"Resolved, that so much of the territory ceded or to be ceded by individual states to the United States, as is already purchased, or shall be purchased of the Indian inhabitants, and offered for sale by Congress, shall be divided into distinct States, in the following manner, as nearly as such cessions will admit; that is to say, parallels of latitude, so that each State shall comprehend from north to south two degrees of latitude, beginning to count from the completion of 45 degrees north of the equator, and by meridians of longitude, one of which shall pass through the lowest point of the rapids of Ohio, and the other through the western cape of the mouth of the great Kenahwa; but the territory eastward of the last meridian, between the Ohio, Lake Erie and Pennsylvania, shall be one state, whatsoever may be its comprehension of latitude. That which may lie beyond the completion of the 45th degree between the said meridians, shall make part of the state adjoining it on the south; and that part of the Ohio, which is between the same meridians coinciding nearly with the parallel of 39 degrees, shall be substituted so far in lieu of that parallel as a boundary line.

That the settlers of any territory so purchased, and offered for sale, shall, either on their own petition or on the order of Congress, receive authority from them, with appointment of time and place, for their free males of full age within the limits of their state, to meet together, for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original states; so that such laws nevertheless shall be subject

to alteration by their ordinary Legislature; and to erect, subject to a like alteration, counties, townships, or other divisions, for the election of members for their Legislature.

That when any such state shall have acquired 20,000 free inhabitants, on giving due proof thereof to Congress, they shall receive from them authority with appointments of time and place, to call a convention of representatives to establish a permanent constitution and government for themselves. Provided that both the temporary and permanent governments be established on these principles as their basis:

1st. That they shall forever remain a part of this confederacy of the United States of America.

2d. That they shall be subject to the articles of confederation in all those cases in which the original states shall be so subject, and to all the acts and ordinances of the United States in Congress assembled, conformable thereto.

3d. That they in no case shall interfere with the primary disposal of the soil by the United States in Congress assembled, nor with the ordinances and regulations which Congress may find necessary for securing the title in such soil to the bona fide purchasers.

4th. That they shall be subject to pay a part of the Federal debts contracted or to be contracted, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states.

5th. That no tax shall be imposed on lands, the property of the United States.

6th. That their respective governments shall be republican.

7th. That the lands of non-resident proprietors shall, in no case, be taxed higher than those of residents within any new state, before the admission thereof to a vote of its delegates in Congress.

That whensoever any of the said states shall have, of free inhabitants, as many as shall then be in any one of the least numerous of the thirteen original states, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the said original states; provided the consent of so many states in Congress is first obtained as may at the time be competent to such admission. And in order to adapt the said articles of confederation to the state of Congress when its numbers shall be thus increased, it shall be proposed to the Legislatures of the states, originally parties thereto, to require the assent of two-thirds of the United States in Congress assembled, in all those cases wherein, by the said articles, the assent of nine states is now required, which being agreed to by them, shall be binding on the new states. Until such admission by their delegates into Congress, any of the said states, after the establishment of their temporary government shall have authority to keep a member in Congress, with a right of debating, but not of voting.

That measures not inconsistent with the principles of the confederation, and necessary for the preservation of peace and good order among the settlers in any of the said new states, until they shall assume a temporary government as aforesaid, may, from time to time, be taken by the United States in Congress assembled.

That the preceding articles shall be formed into a charter of compact; shall be duly executed by the President of the United States in Congress assembled, under his hand, and the seal of the United States; shall be pro-

mulgated; and shall stand as fundamental constitutions between the thirteen original states, and each of the several states now newly described, unalterable from and after the sale of any part of the territory of such state, pursuant to this resolve, but by the joint consent of the United States in Congress assembled, and of the particular state within which such alteration is proposed to be made."

No. 385.

Supreme Court of the United States

October Term, 1911

THE CITY OF CINCINNATI,

Plaintiff in Error,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Brief for Defendant in Error

This case originated in the Court of Common Pleas, Hamilton County, Ohio. Suit was brought by the City of Cincinnati against the Louisville & Nashville Railroad Company to enjoin the Railroad Company from prosecuting a proceeding for the condemnation of an easement in so much of the Public Landing of the City of Cincinnati as should be necessary to enable the Railroad Company to cross said Public Landing with an overhead railroad viaduct, and to enjoin the Railroad Company from crossing certain streets of the City of Cincinnati with overhead railroad tracks. The Railroad Company had instituted said condemnation proceedings and sought to exercise the privilege of crossing said streets, by virtue

of the authority conferred by an ordinance of the City of Cincinnati, passed pursuant to the provisions of an act of the General Assembly of the state of Ohio on the 9th day of May, 1908, known as Sections 3283 and 3283*a*, Revised Statutes of Ohio.

It was contended by the City of Cincinnati that the said city ordinance and the said act of the General Assembly were, so far as they were made applicable to the said Public Landing, in violation of the provision of Section 10, Article I, of the Constitution of the United States, forbidding any state to pass a law impairing the obligation of contracts, and also in violation of Article II, of the Ordinance of 1787, and of the Constitution of Ohio.

What now known as the Public Landing was dedicated in June, 1789, to the public perpetually to be used as a common. At the date of the dedication, Ohio had not been created, and Cincinnati was a part of the Northwest Territory, governed by the act of the Confederate Congress, known as the "Ordinance of 1787."

It was contended by the City of Cincinnati that under the Ordinance of 1787 there had been conferred upon the territory no power of eminent domain, except in the case where the public exigencies made it necessary for the common preservation to take private property; that inasmuch as the dedication of the Public Landing had been made while said ordinance was in force, the conveyance was subject to the provisions of the Ordinance of 1787, and that the donee by the dedication acquired title which could not be taken away by an exercise of the power of eminent domain during the existence of the Northwest Territory, or even subsequently after the territory had ceased to exist as such and states had been organized therefrom.

To the petition of the city the Louisville & Nashville Railroad Company filed a general demurrer. The demurrer was sustained and judgment was entered in favor of the Railroad Company by the Court of Common Pleas. That judgment was affirmed by the Circuit Court of Hamilton County, Ohio, and that judgment in turn affirmed by the Supreme Court of Ohio, and this proceeding has been brought by the City of Cincinnati to reverse the judgment of the Supreme Court of Ohio.

The Federal Question.

The question which the Record presents is this: Is the City of Cincinnati, as the grantee of real estate in Ohio dedicated to a public use, entitled to an injunction to restrain its appropriation for another public purpose under a provision of a statute of the state conferring upon the expropriator the power of eminent domain broad enough to justify the appropriation, the injunction being sought on the ground that, the dedication having been made prior to the admission of the state of Ohio into the Union and while the Ordinance of 1787 was in force, such condemnation would violate the provision of Section 10, Article I, of the Constitution of the United States, forbidding any state to pass any law impairing the obligation of contracts; and this involves the further question, whether Article II, of the Ordinance of 1787, is still operative over the territory embraced within the state of Ohio, and if so, whether this court has jurisdiction to enforce the same.

From any viewpoint the contention of plaintiff in error is untenable.

I. Under the Ordinance of 1787 there was conferred upon the territorial legislature the power of eminent domain.

It is true that the government created by the Ordinance of 1787 had only such powers as were expressly, or by necessary implication, conferred upon it by that ordinance, yet it will be found by an examination of the text of that instrument that these powers were of wide scope.

This was the first attempt made by a continental free government in America to organize a dependent territory. The Confederate Congress had before it the history of the original states and their various charter forms of government. It knew of the ordinary needs and of the exigencies inseparably connected with the settlement of a new territory largely occupied by Indians, and yet suited for the development of an Anglo-Saxon civilization such as would justify its subsequent admission into the Union as states. It was also aware, of course, of the distance of the territory from the seat of central government, and of the time and hardship incident to communication between this new territory and Philadelphia, or any other probable federal capital.

Reading the ordinance in the light of the circumstances under which it was adopted, it becomes apparent that it was designed to provide fully for all purposes of a local government which was to be the forerunner of a permanent government in the several states which should be organized after the model of the original states.

The ordinance provided, therefore, for a governor, a secretary, a militia, a court, and a General Assembly or Legislature, consisting of an appointive legislative council and of an elective House of Representatives. No attempt

was made to classify or enumerate the various matters with reference to which the General Assembly might enact laws. On the contrary, the ordinance adopted the practice later followed by most of the subsequently created states, and conferred legislative power upon the General Assembly in broad language. The latter part of Section 11 of the ordinance provides that:

> "The governor, legislative council and house of Representatives shall have authority to make laws *in all cases* for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared."

The Ohio Constitution of 1802 conferred legislative power upon the General Assembly in the same broad form, the provision being as follows:

> "Article I, Section 1: The legislative authority of this state shall be vested in a General Assembly, which shall consist of the senate and house of representatives, both to be elected by the people."

The second Constitution of Ohio, now in force, was adopted in 1851. Legislative power is there conferred upon the General Assembly in the same way. The provision is found in Article II, Section 1, as follows:

> "The legislative power of this state shall be vested in a general assembly, which shall consist of a senate and a house of representatives."

In a number of cases in Ohio, the leading one of which is *Giesy* v. *Railroad Co.*, 4 O. S., 308, it has been held that this grant of general legislative power conferred upon the General Assembly the power of eminent domain.

The Ordinance of 1787 contains in the articles appended to Section 14, a general Bill of Rights and provisions for the subsequent organization of the states contemplated to be formed out of the territory. In Article II, this language is found:

> "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

In the first, or 1802, Constitution of Ohio, Article VIII, Section 4, provides that:

> "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner."

In the second, or 1851, Constitution of Ohio, Article I, Section 19, provides that:

> "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in

> money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, etc."

With reference to this constitutional limitation in the Ohio Constitution of 1851, the Supreme Court of Ohio, in the case above cited, *Giesy* v. *Railroad Company,* has declared that it does not confer the power of eminent domain, but simply prescribes modes for, and limitations upon, its exercise.

The same conclusion has been reached in other states with reference to similar provisions, and it must be conceded that the limitation contained in the Ohio Constitution of 1802 is not the source of the legislative control over the power of eminent domain, but is solely a regulation regarding the exercise of that power already conferred.

By an analogy of reasoning it would appear that the Confederate Congress did not intend to confer the power of eminent domain by the language quoted above from Article II, of the Ordinance of 1787. That article does not lodge the power of eminent domain in the General Assembly, or in any other department of the government created, but only limits the exercise of the power. It recognizes that there is a power of eminent domain in the territorial government by providing that, "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." In this instance, just as in the case of the later constitutions, the protection afforded the individual in his person and property is a limitation upon, and not a grant of, power. The grant having been made in the general language conferring legislative authority upon the

General Assembly, "in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared," we find in this second article the one and only principle and article in the ordinance limiting the General Assembly's exercise of the legislative power of eminent domain.

Section 6 of the ordinance relates to the organization of the militia, and authorizes the governor to be commander-in-chief, and to appoint and commission all officers below the rank of general officers, the latter of whom are to be appointed and commissioned by Congress. It is evidently to that section that the provision in Article II refers, that should the public exigencies make it necessary, for the common preservation, to demand any person's particular services, full compensation shall be made. Article II itself does not provide who may demand any person's particular services. Neither does Article II provide who may take any person's property should the public exigencies make it necessary for the common preservation, and we must look to the remainder of the ordinance to discover who has that authority. The only place it can be found is in the grant of plenary legislative power to the General Assembly.

The contention of plaintiff in error, that the power of eminent domain was conferred upon the government established by the ordinance to be exercised only for the common preservation in the case of public exigency, is not only contrary to the express language of the ordinance, but is inconsistent with the purposes of the Confederate Congress in organizing the territorial government.

One of the first needs of the settlers was the opening of ways and the establishment of post roads. Without these no civilized government could be effective. Without the

power of eminent domain the territory could not be developed and the government would necessarily fail. Other needs of the new government would necessarily arise from time to time which would be so essentially local in their character that it would have proved impracticable to secure action by the Confederate Congress or by the original states for the acquisition of the land needed to supply these needs. Such local needs would arise in acquiring land for a meeting house for the General Assembly, for the holding of the court created by the ordinance, for the establishment of commons for town meetings, for the establishment of schools, etc.

It would not militate against the contention that the "General Assembly" of the territory had power and authority under the Ordinance of 1787 to prescribe a mode, which, when prescribed, would be "the law of the land" to govern in the taking of private property for public use if it did not see fit to exercise such power, for the question would remain, in view of the controversy now before the court, whether the Legislature in fact had such power, and that would be determined from a construction of the language employed in defining its authority.

On the other hand, it adds to the force of our contention that the Territorial Legislature did, in fact, exercise such power.

December 13, 1799, the Legislature for the territory northwest of the River Ohio, passed an act entitled, "An act for opening and regulating public roads and highways." 1 Chase, 260, of which the fifth section (261) reads as follows:

> "Section V. That if any person through whose land any proposed public road may run, feels aggrieved thereby, such person may at any time

before such road is recorded, and not afterwards, set forth his grievance, by way of remonstrance, against such proposed road, or any part thereof, presented to the court of general quarter sessions of the peace of the proper county, and the court shall nominate five disinterested freeholders of the county, who shall not be related to any of the parties interested in opening or objecting against such proposed road, and shall assign a day for such freeholders to meet, where such proposed road begins; it shall be the duty of such five freeholders, respectively, having had five days' previous notice from either of the parties, to meet on the day and at the place assigned by the court, and then, or on any other day prior to the next sessions, to which a majority may adjourn (having first taken an oath or affirmation, before some person qualified to administer oaths, impartially to assess the damage, or several damages which any such objector or objectors may be likely to sustain by reason of such proposed road, in case the same should be opened and continued through his, her or their land) to review such proposed road, and take into their consideration how much less valuable any tract of land, the property of such objector or objectors, will be rendered by reason of such proposed road, should the same be opened and continued through such tract, respectively, and shall assess the damage, or several damages accordingly, and report the same to the court of general quarter sessions of the peace, next to be holden for the proper county; and if any three of them agree in assessing damages to the amount of the costs accruing on such remonstrance, the court may, if they consider it expedient, order the damages to be defrayed out of the county stock, or if that may be considered inexpedient, and the petitioners will defray the same, then, in either case, such road shall be

> ordered to be opened, and a record thereof made, and the costs and charges having accrued in virtue of such remonstrance, shall be defrayed out of the county stock; but if three of such freeholders do not agree in assessing damages to the amount of the costs aforesaid, then such objector or objectors shall pay the costs, and such proposed road shall be ordered to be opened and recorded in like manner as though no such objections had been made."

This act was referred to with approval by Judge Grimke, speaking for the Supreme Court of Ohio, in the case of *Willyard* v. *Hamilton* (7 Ohio, Part II, page 116), where the proposition was upheld that the intervention of a jury was unnecessary to fix the amount of compensation to which an individual was entitled whose property had been taken for public use.

It was doubtless because under the territorial government, and also under the Constitution of 1802, a jury was not required to fix such compensation that in the Constitution of 1851 that requirement was explicitly made. At any rate, discussing this question, Judge Grimke said (7 Ohio, Part II, page 116):

> "And one of the first acts, which I recollect, is that of December 13, 1799, by which five commissioners are authorized to take the land of private individuals, where the public convenience requires that a road should be conducted over it, and declaring that any three of the five may agree in the assessment of damages to the owners. This act is of great importance; for here were a people living under a republican form of government with almost every form of civil polity, the same as at present, who afterward frame a constitution for themselves, and who, in effect, declare that jury

trial shall be held inviolate as it was before; and yet the intervention of a jury, in such cases, was not only unknown, but, by necessary implication, was absolutely prohibited. If it should be supposed that the term of our territorial government was too short to settle the true import of the term jury trial, the constitution and laws of the other states may afford us some light. But in examining these, it will be found that although the constitutional provision is generally the same as ours, yet that there is the greatest variety in the procedure which the laws authorize. In some of them, three commissioners are appointed; in some five, and in others a greater number. In some the appointment is made by the Legislature; in others, by the Supreme Court, and, in others again, by a county court. And this has been the case, notwithstanding some of these states have changed their constitutions in the intermediate time, and have guarded the provisions by no additional or explanatory declaration. Perhaps there is no constitutional question which has ever been discussed in this country, which has been so completely settled by contemporaneous construction and universal acquiescence. On what principle is it that juries are dispensed with in the greater number of our courts, in courts of equity, courts of admiralty, courts martial, and courts of justices of the peace. Magna Charta declares that no man shall be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land. Mr. Sullivan (Sections 39 and 40) remarks that as juries were unknown in those courts before the great charter, their disuse constituted a part of the law of the land; and, therefore, although that charter was the first great instrument which solemnly guaranteed jury trial to Englishmen, yet it has never been supposed that that institution constituted a part of the

> machinery of those courts. And I believe it would be equally difficult in that country to find an instance of the intervention of a jury, in the proper acceptation of the term, in a case like the present. In the *Governor and Company, etc.*, v. *Meredith*, 4 D. & E., 794, which was an action of trespass like the present, the defendants had acted under an act of parliament, authorizing the straightening the streets of a town; the act also appointed commissioners to assess the damage done to individual proprietors. The court were unanimous that the action would not lie. Buller remarked that where the public welfare required it, private property might be taken without making compensation, and that, therefore, on general principles, the action would not lie, but that, at any rate, as commissioners had been provided to estimate and pay the amount of compensation, that that alone was a sufficient answer to the action."

If it be clear, as we think it is, both upon reason and upon authority, that the "General Assembly" had power to prescribe as "the law of the land" the procedure it provided by the act of December 13, 1799, to govern the taking of private property for the public use, then the parties to the dedication in question were chargeable with notice that the subject of that dedication was liable to be subjected at any time to some other public use that the "General Assembly" might deem of greater importance; and if this Public Landing was thus liable to such an exercise of the power of eminent domain by the territorial government, there can not be any question that it remained so liable after statehood, when, as conceded by the plaintiff in error, this power of eminent domain belonged to the state as one of its inherent powers of sovereignty.

II. Whatever limitations the Ordinance contained upon the exercise by the territorial legislature of the power of eminent domain, they became of no effect upon the organization and admission of the State of Ohio into the Union.

This is evident from the fact that the Constitution of Ohio superseded the Ordinance of 1787. Subsequent to the adoption by the Confederate Congress of the ordinance, the Federal Constitution was adopted, which superseded the Articles of Confederation of 1777. By the adoption of the new Federal Constitution there was for the first time made a distribution of the sovereign powers between the general government and the state governments. By the admission of the state of Ohio in conformity to Section 13 of the ordinance, and to Articles IV and V appended to Section 14 of the ordinance, and under the authority of the Federal Constitution, all powers of sovereignty in the territory included in the state of Ohio, other than those specially granted to the Federal government by the Federal Constitution, were lodged in the state of Ohio. Whether theretofore there existed in the same territory a local power of eminent domain or not, such power did exist in the state of Ohio upon the adoption of its constitution and its admission to statehood.

Indeed, upon this proposition there is no controversy. Counsel for plaintiff in error say in their brief in this case, "Nor did the state of Ohio upon her admission acquire her right to eminent domain by succession from either Virginia or the Confederated states. Her rights sprang into existence as an inherent incident to the sovereignty with which she became vested by reason of her erection into a state."

Since, therefore, the state of Ohio has had since 1802 the full power of eminent domain, excepting such part as is reserved to the Federal government for purely Federal purposes, there is and can be no land within the state of Ohio not subject to the state's power of eminent domain. That power is a right of sovereignty superior to any private right of property, however or whenever acquired. Subject only to the constitutional limitations upon its exercise, which in the state of Ohio are now that compensation shall be made, and in some instances first made in money, the Legislature of the state is vested with the full sovereignty of the state in determining in what instances and for what purposes and over what lands the power shall be exercised. Against this sovereignty no private rights avail. Contracts are not protected from it by the Federal Constitution or the state constitution, for the very contract may itself be appropriated by the state in the exercise of this power.

The purpose of Section 10, of Article I, of the Federal Constitution, forbidding a state to pass any law impairing the obligation of contracts, was not to limit the exercise by the state of the power of eminent domain. When the effect of such exercise is to appropriate a contract right for which compensation is given, the contract is not thereby impaired or abrogated, but its validity is recognized, and all rights thereunder merely pass by forcible purchase to the state.

In the case of *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S., 685, this proposition is fully recognized. Say the court at pages 688-691:

> "The contention of plaintiff in error is that the proceedings had under the statute which resulted in the judgment of condemnation violate

Section 10, Article I, of the Constitution of the United States, which forbids any state to pass a law impairing the obligation of contracts, and were not 'due process of law,' as required by the Fourteenth Amendment.

"With reference to the first part of this contention it is said that in 1881 the town of New Lots made a contract with the water supply company by which for each and every year during the term of twenty-five years it covenanted to pay to the company so much per hydrant for hydrants furnished and supplied by it; that the act of annexation continued the burden of this obligation upon the territory within the limits of the town, although thereafter the town as a separate municipality ceased to exist, and the territory became simply a ward of the city of Brooklyn; that the condemnation proceedings destroyed this contract and released the territory from any obligation to pay the stipulated hydrant rental; that a state or municipality cannot do indirectly what it cannot do directly; that as the municipality could not by any direct act release itself from any of the obligations of its contract, it could not accomplish the same result by proceedings in condemnation. We can not yield our assent to this contention. All private property is held subject to the demands of a public use. The constitutional guarantee of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, in-

dividual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation. It is not disputed by counsel that, were there no contract between the company and the town, the waterworks might be taken by condemnation. And so the contention is practically that the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain, because taking the tangible property will prevent the company from supplying water, and, therefore, operate to relieve the town from the payment of hydrant rentals. In other words, the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken by it. Such a decision would be far-reaching in its effects. There is probably no water company in the land which has not some subsisting contract with a municipality which it supplies, and within which its works are located, and a ruling that all those properties are beyond the reach of the power of eminent domain during the existence of those contracts is one which, to say the least, would require careful consideration before receiving judicial sanction. The fact that this particular contract is for the payment of money for hydrant rental is not vital. Every contract is equally within the protecting reach of the prohibitory clause of the Constitution. The charter of a corporation is a contract, and its obligations can not be impaired. So it would seem to follow, if plaintiff in error's contention is sound, that the franchises of a corporation could not be taken by condemnation, because thereby the contract created by the charter is impaired. The privileges granted to the corporation are taken away, and the obligation of the corporation to perform is also destroyed.

"The vice of this argument is twofold. First, it ignores the fact that the contract is a mere incident to the tangible property; that it is the latter which, being fitted for public uses, is condemned. And while the company, by being deprived of its tangible property, is unable to perform its part of the contract, and, therefore, can make no demands upon the town for performance on its part, it still is true that the contract is not the thing which is sought to be condemned, and its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property. Second, a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650, 673. Its condemnation is, of course, subject to the rule of just compensation, and that is all that is implied in the decisions such as *Hall* v. *Wisconsin*, 103 U. S., 5, cited by counsel. In that case it appeared that Hall had a contract with the state for services entered into in pursuance of a statute, that he performed the services but that before finishing his work the Legislature repealed the statute authorizing the contract. It was held that he was, nevertheless, entitled to his stipulated compensation. The act of the Legislature in the repeal was not one providing for condemnation, and in so far as it partook of the nature of a condemnation it ignored the obligation of just compensation, and was, therefore, void; but it was not held that, if just compensation had been provided and a public use required, the contract might not have been condemned.

"The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses."

Also, on page 692, the court quotes, with evident approval, the following language from a New York decision:

> "No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it can not be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise."

The foregoing case is followed in

Offield v. *Railroad Company,* 203 U. S., 372, 382.

It is this sovereign power of eminent domain which can appropriate tangible and intangible property alike which is sought to be limited by the injunction prayed for in this case. As a matter of fact, however, the appropriation authorized by the state statute attacked by plaintiff in error is not the appropriation of a contract right but the

appropriation of land. It is a tangible and not an intangible property which is to be taken. The city is a defendant in the appropriation proceedings and the plaintiff in this case, not as one having a contract the obligations of which the state seeks to impair, but as the owner of real estate which the state seeks to take. That which will pass by the appropriation is not intangible rights but the title to land within the boundaries of the expropriating state.

It is a strained construction of a deed to consider it as a subsisting contract a century and a third after its grant has vested title to land in the grantee. The grantee has not a right to, but an estate in, the land itself, held by a title derived, it is true, through contract but subsisting as a complete and vested title in the grantee.

In

> *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420,

this court say at page 582:

> "After a careful examination of the questions adjudged by this court, they seem not to have decided in any case that the contract is impaired, within the meaning of the Federal Constitution, where the action of the state has not been on the contract. That though vested rights have been devested under an act of a state legislature, they do not consider that as impairing the grant of the state, under which the property is held. And this, it appears, is the true distinction, and the one which has been kept in view in the whole current of adjudications by this court, under the above clause of the Constitution."

But should the view of plaintiff in error prevail that the appropriation sought to be enjoined in this case is the appropriation of a contract right, the power to make such appropriation is, as we have shown above, ample and complete.

III. All land within Ohio has at all times since its occupation by civilized governmental authority been subject to the right of eminent domain.

Since the power of eminent domain is an attribute of sovereignty, it follows that at all times the land embraced within territory subject to any sovereignty is subject to the exercise of this power. Whether during the period of time when the territory now within the state of Ohio was under the joint government of the Confederate Congress and the local government established by the Ordinance of 1787, and the later period of time when it was under the government of the Federal Union and the Ordinance of 1787, it was subject to the exercise by the territorial government of the power of eminent domain or not, it was certainly subject to the exercise by either the territorial government or the Confederate or the Federal government of that power. There was of necessity a sovereign power over the Northwest Territory and it follows that there was a sovereign right of eminent domain over the land within the territory. The conveyances, therefore, made during the time the territorial government prevailed over what is now the state of Ohio must have been made, and could have legal effect only, by virtue of there being a sovereign government, and to that sovereign's power of eminent domain they must have been subject. It is, therefore, idle to deny the proposition that deeds,

grants or any conveyances of property by any persons whatsoever during the continuance of the territorial government in Ohio were subject to and included as an implied condition the possible subsequent taking of the land by the power of eminent domain. It avails nothing to seek to determine whether at the time of the dedication of the common to the inhabitants of the town of Cincinnati, the remnant of sovereignty not delegated to the territorial government was vested in the state of Virginia, or the state of Connecticut, or the confederated states. The fact remains that in some government or governments there did subsist the power of eminent domain unrestricted save by the limitation of Article II, of Section 14, of the ordinance.

IV. This court has repeatedly held that the Ordinance of 1787 ceased to be operative in the territory of states subsequently formed out of the Northwest Territory.

In the case of

Escanaba Co. v. *Chicago,* 107 U. S., 678,

Mr. Justice Field, delivering the opinion of the court, and without dissent by any justice, uses the following language at page 688:

> "The ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and although it appears to have been treated afterwards as in force in the territory, except as modified by Congress, and by the act of May 7, 1800, c. 41, creating the Territory of Indiana, and by the act of February 3, 1809, c. 13, creating the Territory of Illinois, the

rights and privileges granted by the ordinance are expressly secured to the inhabitants of those Territories; and, although the act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a constitution and state government, and the resolution of Congress of Dec. 3, 1818, declaring the admission of the state into the Union, refer to the principles of the ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the state after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the *original states* in all respects whatever.' 3 Stat., 536. Equality of constitutional right and power is the condition of all the states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek and Pennsylvania over the Schuylkill River. *Pollard's Lessee* v. *Hagan,* 3 How., 212; *Permoli* v. *First Municipality, Id.,* 589; *Strader* v. *Graham,* 10 *Id.,* 82."

This language was quoted with approval and the proposition again applied by the Supreme Court of the United States in the case of *Huse* v. *Glover,* 119 U. S., pp. 543, 546.

In the later case of

Sand v. *Manistee River Imp. Co.*, 123 U. S., 288,

Mr. Justice Field again speaks upon the same subject, saying at page 295:

> "The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that its articles 'shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable unless by common consent.' And for many years after the adoption of the Constitution, its provisions were treated by various acts of Congress as in force, except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments, it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories. Yet from the very conditions on which the states formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the states thus formed were, in the language of the resolutions or acts of Congress, 'admitted into the Union on an equal footing with the *original states* in all respects whatever.' Michigan, on her admission, became, therefore, entitled to and possessed of all the rights of sovereignty and

dominion which belonged to the original states, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof. *Permoli* v. *First Municipality of New Orleans*, 3 How., 589, 600; *Pollard* v. *Hagan*, 3 How., 212; *Escanaba Co.* v. *Chicago*, 107 U. S., 678, 688; *Van Brocklin* v. *Tennessee*, 117 U. S., 151, 159; *Huse* v. *Glover*, 119 U. S., 543, 546."

This same proposition is affirmed in the following cases:

Hamilton v. *Vicksburg, etc., R. R. Co.*, 119 U. S., 280, 284.

Cardwell v. *Bridge Company*, 113 U. S., 205, 210, 212.

Ward v. *Racehorse*, 163 U. S., 504.

In the recent case of

Coyle v. *Oklahoma*, 221 U. S., 559,

these cases and others to the same effect were fully reviewed and approved. The decision in all these cases rests upon the fact that all states admitted to the Union subsequent to the adoption of the Federal Constitution must come in on an equal footing with the original states in all respects.

In the case of *Coyle* v. *Oklahoma*, this court has quoted with apparent approval and as a part of the basis of its decision the language of Mr. Justice Field in the case of *Escanaba Company* v. *Chicago*, quoted in this brief above, and uarticularly these sentences, at page 575:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legis-

lation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her readmission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states."

Conclusion

We respectfully submit this case to the consideration of the court with the concluding paragraph of the opinion in the Oklahoma case :

> "To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

Respectfully submitted,

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January 6, 1912.